Nov 29/ Mo to dismiss — R9

17-631

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~785~~ ~~457~~ 177

GEORGE W. HILL, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, AND WILLIAM H. BARNUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED FEBRUARY 4, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 735.

GEORGE W. HILL, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, AND WILLIAM H. BARNUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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To the honorable the justices of the Supreme Court of the United States:

Your petitioner, George W. Hill, respectfully shows unto your honors that he is aggrieved by a final judgment of the supreme court of the State of Illinois, rendered on the 18th day of November, 1879, in a suit then in said last-mentioned court pending, wherein your petitioner was appellant, and George T. Harding, Lawrence J. J. Nissen, and William H. Barnum were appellees; which said judgment was in affirmance of the judgment of the appellate court of the first district of said State, and that said last mentioned judgment was an affirmance of the judgment of the circuit court of Cook County, in said State, in a certain action in which the said George T. Harding, Lawrence J. J. Nissen, and William H. Barnum were plaintiffs, and your petitioner was
2 defendant, by which last-mentioned judgment the said plaintiffs in said action were considered to recover of your petitioner the sum of $3,500.00 and costs. Said judgment was rendered in an action of assumpsit, in which a provisional attachment had been sued out by the plaintiffs at the commencement of the action and levied on certain of the defendant's property, to relieve which the defendant gave a recognizance under the statute of Illinois, with sureties to dissolve the attachment.

After verdict and before judgment, and while a motion for a new trial was pending, the defendant, on the 22nd day of April, 1878, was adjudicated a bankrupt, and on the 11th day of May, 1878, and before any other proceedings were had in said cause, on due notice to the plaintiff's counsel, the defendant's counsel made a motion
3 to stay further proceedings in said action to await the determination of the court of bankruptcy on the question of the discharge of the defendant, and in support of his motion produced and filed a properly certified copy of the record of the adjudication of bankruptcy. But the court overruled said motion for a stay of proceedings and entered the judgment complained of, from which the defendant appealed, assigning as error, among other things, that the court erred in denying said motion for a stay of proceedings and entering judgment, and this was the principal question decided by the two appellate courts above mentioned, which involved a construction of certain laws of the United States, to wit, sections 5044, 5106, 5119, 5118 of the Revised Statutes of the United States, title Bankruptcy, and by the judgment of said
4 supreme court your petitioner was denied the benefit of the above specified provisions of the laws of the United States.

Your petitioner further shows that the said supreme court of the State of Illinois is the highest court of that State. All of which will fully and at large appear by reference to a copy of the record of the proceedings in said cause in the said last mentioned court, and a certificate under the hand of Hon. Pinkney H. Walker, the chief justice of said court, filed herewith as part of this petition.

Your petitioner respectfully submits that the said supreme court of the State of Illinois erred in holding and adjudging that there was no error in the judgment of the court below in refusing to grant a
5 stay of proceedings under the bankrupt act, and in entering said judgment notwithstanding said motion.

Your petitioner therefore prays that a writ of error, to operate as a supersedeas to said judgment, may issue from this honorable court to the supreme court of the State of Illinois, and that the record of said judgment may be brought into this court, and the manifest errors

therein corrected, and that said judgment may be reversed; and, as in duty bound, will ever pray, &c.

GEORGE M. BRANDT,
Attorney for Petitioner.

Writ of error allowed, and upon approval by me of bond in the sum of $5,000, which has been previously certified by the circuit judge of the United States for the 7th circuit, or by the district judge of the northern or southern district of Illinois, to be good for the above amount, citation will issue, to operate as a supersedeas, provided bond is presented for my approval within 60 days from the date of the judgment of the supreme court of the State of Illinois.

JOHN M. HARLAN,
Circuit Justice.

DEC. 12, '79.

6 UNITED STATES OF AMERICA.
State of Illinois, ss:

In the supreme court of the State of Illinois.

GEORGE W. HILL, APPELLANT,
v
GEORGE F. HARDING, J. J. NISSEN, AND WILLIAM H. BARNUM, appellees.

I, Pinkney H. Walker, chief justice of the supreme court of Illinois, hereby certify that the above entitled cause was lately pending in said court; that George W. Hill, appellant, before judgment was rendered therein against him in the circuit court of Cook County in this State, in which this case was originally com'enced, claimed to have been adjudged a bankrupt under the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved March the 2nd, A. D. 1867. He also moved the said court, before said judgment was rendered against him therein, to stay all further proceedings
7 in the said circuit court in said cause, to await the determination of the court of bankruptcy on the question of his discharge as such bankrupt. That he based his motion on section twenty-one of said bankrupt act. He also claimed that the debt due from appellant to appellees and which was the foundation of the judgment in said circuit court in this case, was one provable under said bankrupt law. It appears from the transcript of the record in this case that said circuit court refused to stay proceedings in said cause and overruled said motion and rendered judgment against said appellant and, as claimed, thereby denied him a right, privilege, or immunity under said section of the bankrupt law. At the September , A. D. 1879, of the supreme court of Illinois, said judgment and action of the said circuit court was ratified and affirmed by said supreme court of Illinois. Said supreme court of Illinois is the highest court of the State in which a decision in said suit can be had. Whether said stay of proceedings in said cause can or should or should not have been granted in said cause was one of the principal questions in said cause and the one upon which the decision of the case turned.

Given under my hand at chambers the 27th day of November, A. D. 1879.

P. H. WALKER,
Chief Justice Supr. Crt of Illinois.

8 At a supreme court begun and held at Ottawa on Tuesday, the second day of September, in the year of our Lord one thousand eight hundred and seventy-nine, within and for the northern grand division of the State of Illinois.

Present, Pinkney H. Walker, chief justice; John M. Scott, justice; Benjamin R. Sheldon, justice; Alfred M. Craig, justice; John Scholfield, justice; T. Lyle Dickey, justice; John H. Mulkey, justice.

GEORGE W. HILL
vs.
GEORGE T. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum. } No. 45.

Appeal from appellate court, first district.

Be it remembered that heretofore, to wit, on the 22nd day of July, A. D. 1879, there was filed in the office of the clerk of the supreme court of Illinois, northern grand division, certain records for the appellate court, first district, which said records are in words and figures following, to wit:

9 UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the Honorable Henry Booth, one of the judges of the circuit court of Cook County, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 15th day) of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102nd.

Present, Honorable Henry Booth, one of the judges of the circuit court of Cook County, State of Illinois; L. L. Mills, State's attorney; Charles Kern, sheriff.

Attest:

JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 16th day of March, A. D. 1877, Harding, Nissen, and Barnum, pro se, filed in said court their certain affidavit in attachment and attachment bond, and caused to be issued out of said court, under the seal thereof, the people's writ of attachment, directed to the sheriff of Cook County to execute, which said affidavit, bond, and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

10 *Affidavit.*

In the circuit court of Cook County.

STATE OF ILLINOIS,
Cook County, ss:

William H. Barnum, being duly sworn, deposes and says that George W. Hill is indebted to George F. Harding, Lawrence J. J. Nissen and William H. Barnum, aforesaid, composing the firm of Harding, Nissen and Barnum, after allowing all just credits and set-offs, in the sum of eight thousand two hundred and sixty-four dollars ($8,264 00) for and upon divers legal and professional services rendered by said firm as attorneys at-law in prosecuting and defending divers suits at the request of said George W. Hill; and affiant further states that the said George

W. Hill is a resident of this State, and that his place of residence is at number 375 Warren avenue, Chicago, Illinois, and that said George W. Hill is about fraudulently to conceal, assign, or otherwise dispose of his property or effects so as to hinder or delay his creditors. And further deponent sayeth not.

WILLIAM H. BARNUM.

Subscribed and sworn to before me this 16th day of March, A. D. 1877.

JACOB GROSS, *Clerk.*

11 *Attachment bond.*

Know all men by these presents that we, George F. Harding, Lawrence J. J. Nissen and William H. Barnum, as principals, and Edwin Lee Brown, as surety, are held and firmly bound unto George W. Hill in the penal sum of seventeen thousand dollars and cents, lawful money of the United States, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals, and dated this 16th day of March, A. D. 1877.

The condition of this obligation is such that whereas the above-bounden William H. Barnum has on the day of the date hereof prayed an attachment out of the circuit court of Cook County, at the suit of George F. Harding, Lawrence J. J. Nissen and William H. Barnum, composing the firm of Harding, Nissen & Barnum against the estate of the above-named George W. Hill, for the sum of eight thousand two hundred and sixty-four dollars and cents, and the same being about to be sued out of said court, returnable on the 16th day of April,
12 A. D. 1877, to the term of the said court then to be holden:

Now, if the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum shall prosecute their said suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the said George W. Hill all such costs in said suit, and such damages as shall be awarded against the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, their heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

GEO. F. HARDING. [SEAL.]
LAWRENCE J. J. NISSEN. [SEAL.]
WILLIAM H. BARNUM. [SEAL.]
EDWIN LEE BROWN. [SEAL.]

Attachment writ.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the sheriff of Cook County, greeting:

Whereas William H. Barnum hath complained that George W. Hill is justly indebted to George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, composing firm of Harding, Nissen, and Barnum, to the amount of eight thousand two hundred and sixty four dol-
13 lars, and oath having been also made that the said George W. Hill is about, fraudulently, to conceal, assign or otherwise dis-

pose of his property or effects so as to hinder or delay his creditors, and the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum having given bond and security according to law: we therefore command you that you attach so much of the estate, real or personal, of the said George W. Hill, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs according to the said complaint, and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to law, and that you summon George W. Hill to appear and answer the complaint of the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum at a term of the circuit court to be holden at Chicago, in the county of Cook, upon the third Monday of April next, and that you also summon and such other persons as you shall be required by the said , as garnishee, to be and appear before the said court on the said third Monday of , A. D. 187 , then and there to answer what may be objected against 14 , when and where you shall make known to the said court how you have executed this writ; and have you then and there this writ.

Witness Jacob Gross, clerk of our said circuit court, and the seal thereof, at Chicago, in said county, this 16th day of March, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

Endorsement.

By virtue of the within writ I have levied upon all the right, title and interest of the within named defendant in and to the following property described, to wit: Southwest quarter (¼) of section thirty-one (31), in township thirty eight (38), north, range fifteen (15) east of 3rd principal meridian; also the northeast quarter (¼) of section thirty-six (36), in township thirty eight (38) north, of range fourteen (14) east of 3rd pr. m.; also all the interest of said George W. Hill in Hill's Addition to South Chicago, being a subdivision of the southwest quarter of section thirty-one (31), in township (38) thirty-eight north, range fifteen (15) east of the 3 p. m. town of Hyde Park; also the west eighty eight and one-half (88½) feet of south half of lots nine (9) and ten (10), in block fifty-nine (59), section seven (7), township thirty-nine (39) north, 15 of range fourteen (14) east of third pr. m.; also all interest of said George W. Hill in section fourteen (14), township thirty seven (37) north, range thirteen (13) east of 3rd pr. m.; also all interest of said George W. Hill in section twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east of third principal meridian; all of the foregoing described lands situate in the county of Cook, and State of Illinois. This sixteenth day of March, 1877.

CHARLES KERN, *Sheriff.*
By JOHN GARRICK, *Deputy.*

The within named defendant not found in my county this 16th day of April, 1877.

CHARLES KERN, *Sheriff.*
By H. B. GALPIN.

And thereupon, on the 24th and 28th day of March, A. D. 1877, the following, among other proceedings, were had and entered of record in said court, to wit:

M'CH 24, '77.

GEORGE F. HARDING ET AL.
vs.
GEORGE W. HILL. } 23977—7648. Attachment.

And now, at this day, on motion, it is ordered that the time in
16 which to file bond in said cause be, and it is, extended until 2 o'clock Monday morning next.

M'CH 28, '77.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, composing the firm of HARDING, NISSEN and BARNUM
vs.
GEORGE W. HILL. } 23977—7648. Attachment.

This day came the said George W. Hill, as principal, and Horace M. Singer and Thomas B. Rice, as sureties, and entered into a recognizance herein, in open court, whereby they and each of them, for themselves, their heirs, executors, and administrators, acknowledged themselves to owe and to be indebted unto the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the penal sum of sixteen thousand five hundred and twenty-eight dollars, to be levied of their respective goods and chattels, lands and tenements and real estate. The condition of which recognizance was such that if the said George W. Hill should pay to the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum the amount of the judgment and costs which may be rendered against him in this suit on a final trial hereof within
17 ninety days after such judgment shall be rendered, then such recognizance to be void, otherwise to remain in full force and effect.

It is therefore ordered that the attachment herein be, and it is, dissolved, and that the property taken by virtue thereof be restored to the said defendant.

And thereupon, on the 6th day of April, A. D. 1877, there was filed in said cause a certain declaration, affidavit, and account, in the words and figures following to wit:

Declaration.

In the circuit court of Cook County, to the April term, A. D. 1877.

STATE OF ILLINOIS,
Cook County, ss:

George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, copartners doing business under the firm name of Harding, Nissen, and Barnum, plaintiffs in this suit by Willlam H. Barnum, their attorney, complain of George W. Hill, defendant in this suit, who has been summoned, etc., and whose property has been attached, of a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the fifteenth day March, in the year of our Lord one thousand eight hundred and seventy-seven, at,
18 to wit, the county aforesaid, the said defendant became and was indebted to the said plaintiffs in the sum of, to wit, ten thousand

dollars lawful money of the United States, for the work, labor, and services before that time done and performed for the said defendant by the said plaintiff, as his attorneys and legal advisers at the special instance and request of the said defendant, and for materials furnished and money laid out and expended for the said defendant and in his behalf by the said plaintiffs, at the like special instance and request of the said defendant, and being so indebted the said defendant afterwards, to wit, on the day and year and at the place aforesaid, in consideration thereof, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto them, the said plaintiffs, the said sum of money last mentioned, whenever he, the said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year and at the place aforesaid, became and was indebted to the said plaintiffs for work, labor, and services before that time by the said plaintiffs done and performed for the said defendant, as his attorneys and legal advisers, at the special instance and request of the said defendant, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year and at, to wit, the county aforesaid, undertook, and then and there faithfully promised the said plaintiffs that he, the said defendant, would well and truly pay to the said plaintiff so much as the said work, labor, and services were reasonably worth, whenever he, the said defendant, should be thereunto afterwards requested. And the said plaintiffs aver that the said work, labor, and services were reasonably worth the further sum of, to wit, ten thousand dollars, of which the said defendant afterwards, to wit, on the day and year and at the place aforesaid, had notice. And whereas also the said defendant afterwards, to wit, on the day and year and at the place aforesaid, became and was indebted to the said plaintiffs for work, labor, and services before that time done and performed by the said plaintiffs for the said defendant, as the said defendants' attorneys and legal advisers, at the special instance and request of the said defendant, and being so indebted, the said defendant, in consideration thereof afterwards, to wit, on the day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay to the said plaintiffs so much as they deserved to have for their said work, labor, and services done and performed by them as aforesaid, whenever he, the said defendant should be thereunto afterwards requested. And the said plaintiffs aver that for said work, labor, and services they deserve the further sum of, to wit, ten thousand dollars, of which the said defendant afterwards, on, to wit, the day and year and at the place aforesaid, had notice.

And whereas also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, became and was indebted to the said plaintiffs in the further sum of, to wit, ten thousand dollars, of like lawful money, as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said plaintiffs before that time paid, laid out and expended for the said defendant, and at the like request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant

to said plaintiffs; and in the like sum for the price and value of work then done and material for the same provided by the said plaintiffs for the said defendant, and at the like special request of the said defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned when th said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc) has not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs, to wit, ten thousand dollars, and therefore the said plaintiffs bring suit, etc.

WM. H. BARNUM,
Plaintiffs' Attorney.

Affidavit.

STATE OF ILLINOIS,
Cook County, ss:

In the circuit court of Cook County, April term, A. D. 1877.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, copartners, &c., under firm name of Harding, Nissen and Barnum,
vs.
GEO. W. HILL.

STATE OF ILLINOIS,
Cook County, ss:

William H. Barnum, being first duly sworn, deposes, and on his oath says, that he is a member of the firm of Harding, Nissen and Barnum, and one of the plaintiffs in the above entitled cause, and that he is conversant with all the matters and things pertinent and relating thereto, and he says that the demand of the said plaintiffs against the said defendant is for work, labor, and services, by the said plaintiffs done and performed for the said defendant, at his request, as his attorneys and legal advisers, and for money laid out and expended for and at the request of the said defendant by the said plaintiffs; and that after allowing to the said defendant all his just credits, deductions and set-offs, there is due and owing from the said defendant to the said plaintiffs the sum of eight thousand two hundred and sixty-four dollars ($8,264.)

WILLIAM H. BARNUM.

Subscribed and sworn to before me this 6th day of April, A. D. 1877, by the said William H. Barnum.

[NOTARIAL SEAL.] ADOLPH MOSES, *N. P.*

23 *Copy of account sued on.*

Mr. George W. Hills to Harding, Nissen and Barnum, Dr.

1876.

[* January	5.	To taking deposition of Holmes, Hill ats. Potter	20 00]
	8-10.	" " " in St. Louis " " Searl	75 00
	14. to	.....	
February		" preparing and trying case of " " Kibbe	4,500 00
January	19.	" cash paid for copy of deed	2 00
	29.	" attendance in court on motion " " Wheat to strike pleas from file	5 00
February	14.	" demurrer to declaration in Wheat v. Hill sustained and judgment vs. plaintiffs	5 00
March	4.	" attendance on superior court on motion to file new declaration in Wheat v. Hill	5 00
	21.	" drawing & filing pleas to amended declaration and dr'w'g affidavit of Merits in Wheat v. Hill	15 00
April	12.	" vacating judgment " "	10 00
† June	5-13.	" prep'r'g and trying Porter case and settling certificate of evidence	2,000 00]
	17.	" attendance in criminal court	10 00
	20.	" " " " "	5 00
July	8.	" " " " "	10 00
Sept.		" trial notices in four suits in U. S. court	10 00
"		" trip to Quebec ($100)—this is paid.	
October	2.	" retainer and plea in suit of R. K. Turner of mal. prosecution	100 00
	16.	" attendance in crim. court & pr'p'r'g & serving notices of witnesses	7 00
	19.	" attendance in crim. court	5 00
	21.	" " " " " & drawing affidavit of Reed	10 00
	27.	" " " " " & visits to Van Arman's office	15 00
	30.	" " " " "	10 00
November	2.	" " " " "	5 00
	9.	" " " U. S. " watching call	10 00
	11.	" " " " " passing cases	10 00
November to December		" preparing and trying forgery case v. Turner in criminal court & consultations with witnesses, associate counsel, &c	1,500 00
February	10.	" services, consultation, & advice in extradition matter	20 00
		" additional services, attendance upon courts on notices and motions, interviews with witnesses, consultations, etc	250 00
			8,614
24		To work, labor, and services as attorney	10000
		" money paid, laid out, and expended	10000
		" money had and received to and for the use of the plaintiffs	10000
		" money due for interest and forbearance	10000
		" labor, services, and material	10000

And thereupon, on the 18th day of April, 1877, there was filed in said cause certain pleas and affidavits in the words and figures following, to wit:

* Struck out by leave of court.
† Stricken out by leave of court.

STATE OF ILLINOIS,
Cook County, ss:

In the circuit court of said county. To the April term, A. D. 1877.

GEORGE W. HILL
ats.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, William H. Barnum, composing the firm of Harding, Nissen, & Barnum. } Attachment.

And the said defendant, by Leonard Swett, his attorney, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiffs hath above thereof complained against him, and of this he puts himself upon the country, &c.

By LEONARD SWETT AND
JOHN J. HERRICK,
Att'ys for D'ft.

And the said plaintiffs do the like.

HARDING, NISSEN & BARNUM,
Pro se.

STATE OF ILLINOIS,
Cook County, ss:

In the circuit court of said county. To the April term, A. D. 1877.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, William H. Barnum, composing the firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } Attachment.

STATE OF ILLINOIS,
Cook County, ss:

And the said George W. Hill, defendant in the above-entitled cause, makes oath and says that he verily believes he has a good defense to this suit upon the merits as to the whole and to every part of the said plaintiff's demand.

GEORGE W. HILL.

Subscribed and sworn to before me this 17th day of April, A. D. 1877, by George W. Hill. Witness my hand and official seal.

[NOTARIAL SEAL.] WILLIAM H. HOLDEN, *N. P.*

STATE OF ILLINOIS,
Cook County, ss:

In the circuit court of said county. To the April term, A. D. 1877.

GEORGE W. HILL
ats.
GEORGE J. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, partners, &c. } Attachment.

And the defendant, by Leonard Swett, his attorney, comes and defends, &c., and prays judgment of the said writ, and that the same may

be quashed, because he says that he was not, at the time said affidavit of said plaintiff Barnum was made and filed herein, or at the time said writ of attachment was issued, or at any time before said writ of attachment was issued, about fraudulently to conceal, assign, or otherwise dispose of his property, or effects, or any part thereof, so as to hinder or delay his creditors; and of this the defendant puts himself upon the country, &c.

By LEONARD SWETT AND
JOHN J. HERRICK,
His Attorneys.

STATE OF ILLINOIS,
Cook County, ss:

In the circuit court of said county. To the April term, A. D. 1877.

GEORGE J. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, partners, &c.,
vs.
GEORGE W. HILL.
} Attachment.

27 STATE OF ILLINOIS,
Cook County, ss:

George W. Hill, the defendant in the above cause, being first duly sworn, on oath says that the plea by him above pleaded is true in substance and in fact.

GEORGE W. HILL.

Subscribed and sworn to before me this 17th day of April, A. D. 1877.
[NOTARIAL SEAL.] WILLIAM H. HOLDEN,
Notary Public.

And thereupon, on the 26th day of May, A. D. 1877, the following proceedings were had and entered of record in said court, to wit:

MAY 26, '77.

GEORGE F. HARDING ET AL.
vs.
GEORGE W. HILL.
} 23977–7648. Attachment.

On motion of said plaintiffs, by their attorney, it is ordered by the court that the plea of said defendant, filed herein, traversing the attachment writ issued in said cause, be, and the same is hereby, stricken from the files of said cause.

And thereupon, on the 18th, 19th, 20th, 21st, 22nd 25th, 26th, 27th, 28th, and 29th days of March; the 1st, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, and 12th days of April; and the 11th day of May, A. D.
28 1878, the following proceedings were had and entered of record in said cause, to wit:

M'CH 18, '78.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
} 23977–3220. Attachment.

This day came the said parties, by their respective attorneys, and there-

upon also came the jurors of a jury of good and lawful men, to wit: C. R. Crossman, William A. Brainard, George Valentine, Thomas Murphy, Charles Peterson, Martin Van Mehlen, Charles E. Hull, John Muldoon, William Peterson, J. B. Craney, Peter Curry, and C. M. Wood, who were duly impaneled and sworn to well and truly try the issues joined in said cause and a true verdict render according to the evidence, and thereupon (the hour of adjournment having now arrived) the said jurors were allowed to separate and meet the court at the coming in thereof to-morrow morning.

29 M'CH 19.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing part of testimony (the hour of adjournment having arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

M'CH 20, '78.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

30 M'CH 21, '78.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, composing the firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

M'CH 22, '78.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
23977–3220. Attachment.

This day came again the same parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

31 M'CH 25, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

M'CH 26, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony, were allowed to separate and meet the court at the coming in thereof to-morrow morning.

32 M'CH 27, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to morrow morning.

M'CH 28, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

33 M'CH 29, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

APRIL 1, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Wednesday morning next.

34 AP'L 3, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived),

were allowed to separate and meet the court at the coming in thereof to-morrow morning.

AP'L 4, '78.

GEORGE F. HARDING, LAWRENCE J. NISSEN, and WILLIAM H. BARNUM, as Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

AP'L 5, '78.

GEORGE F. HARDING, LAWRENCE J. NISSEN, and WILLIAM H. BARNUM, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

35 This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

AP'L 8, '78.

GEORGE F. HARDING, LAWRENCE J. NISSEN, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day again came the said parties by their respective attorneys, and also came again the jurors of the jury aforesaid, and thereupon after further and concluding testimony was adduced, on motion of plaintiffs by their attorney leave is granted them to amend the bill of particulars on file in said cause by striking out therefrom the item of $2,000.00 of the Porter case, to which ruling of the court the said defendant by his attorney now here excepts, whereupon the said jurors after hearing part of the arguments of counsel (the hour of adjournment having now arrived) were allowed to separate and meet the court at the coming in thereof to-morrow morning.

36 Ap'l 9, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further arguments of counsel (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Ap'l 10, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and also came the jurors of the jury aforesaid, who, after hearing further arguments of counsel (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

37 Ap'l 11, '78.

GEORGE F. HARDING, LAWRENCE J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220 Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further and concluding arguments of counsel as well as instructions from the court, retired from the bar of the court to consider of their verdict, with leave from the court by agreement of counsel that when they shall have agreed upon a verdict, they may reduce it to writing, sign and seal the same, separate & meet the court at the coming in thereof to morrow morning.

Ap'l 12, '78.

GEORGE F. HARDING, LAWRENCE J J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977–3220. Attachment.

This day came again the said parties by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, and return into

court their sealed verdict, whereby they do say, "We the jury find the issue for the plaintiffs, and assess the damages at thirty-five hundred dollars ($3.500)." Whereupon the said defendant by his attorney moves the court to set aside said verdict, and for a new trial of said cause.

38 MAY 11, '78.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, composing the firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977-3220. Attachment.

This day came the attorney for said defennant and suggests upon the record that said defendant has been adjudicated a bankrupt by proceedings in bankruptcy, and moves the court for a stay of proceedings herein, and the court after hearing arguments of counsel thereon, and being fully advised in the premises, doth overrule said motion. Whereupon came on to be heard the motion of said defendant, to set aside the verdict of the jury aforesaid, and for a new trial of said cause, and was argued by counsel, and the court being fully advised in the premises doth overrule said motion.

Wherefore it is ordered and considered by the court, that said George F. Harding, Lawrence J. J. Nissen and William H. Barnum, composing the firm of Harding, Nissen and Barnum, plaintiffs, recover of said George W. Hill, defendant, the sum of $3,500.00 (thirty-five hundred dollars), their damages so as aforesaid by the jury assessed, together with their costs in this behalf expended to be taxed, and have execution therefor.

To all of which the said defendant by his attorney, now here,
39 excepts and prays an appeal to the appellate court of the first district of Illinois, which is granted on condition that said defendant doth within twenty days from date execute and file an appeal bond in said cause, in the penal sum of five thousand dollars, with good and sufficient security thereto. And it is further ordered that said defendant be and he is allowed sixty days from date, in which to prepare and file a bill of exceptions in said cause.

And thereupon, on the 22nd day of May, A. D. 1878, there was filed in said cause a certain appeal bond in words and figures following to wit:

Know all men by these presents, that we, George W. Hill, Horace M. Singer, and Thomas B. Rice, of the county of Cook, and State of Illinois, are held and firmly bound unto George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, also of the same county and State, in the penal sum of five thousand ($5,000.00) dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly, severally, and firmly by these presents. Witness our hands and seals this 22nd day of May, A. D. 1878.

The condition of the above obligation is such that whereas the said George F. Harding, Lawrence J. J. Nissen, and William H. Bar-
40 num did, on the eleventh day of May, A. D. 1878, in the circuit court of Cook County, in the State aforesaid, and of the April term thereof, A. D. 1878, recover a judgment against the above-

bounden George W. Hill for the sum of thirty-five hundred dollars and cents, besides costs of suit, from which said judgment of the said circuit court of Cook County the said George W. Hill has prayed for and obtained an appeal to the appellate court within and for the first district of said State.

Now, therefore, if the said George W. Hill shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

GEORGE W. HILL. [SEAL.]
HORACE M. SINGER. [SEAL.]
THOMAS B. RICE. [SEAL.]

Approved in open court in Chicago this 22nd day of May, A. D. 1878.
HENRY BOOTH, *Judge.*

And thereupon on the 1st day of July, A. D. 1878, there was filed in said cause a certain bill of exceptions, in words and figures following, to wit:

41 In the circuit court of Cook County.

STATE OF ILLINOIS,
County of Cook, ss:

GEO. F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum
vs.
GEORGE W. HILL. } Attachment.

Be it remembered that on the 28th day of March, A. D. 1877, it being then of the March term of said circuit court, the following order was made and entered of record in said cause, that is to say:

This day came the said George W. Hill as principal, and Horace M. Singer and Thomas B. Rice as sureties, and entered into a recognizance herein in open court, whereby they and each of them for themselves, their heirs, executors, and administrators, acknowledge themselves to owe and to be indebted unto the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the penal sum of sixteen thousand five hundred and seventy-eight dollars, to be levied of their respective goods and chattels, lands and tenements and real estate.

The condition of which recognizance was such that if the said *said* George W. Hill should pay to the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum the amount of the judgment and costs which may be rendered against him in this suit on a
42 final trial thereof, within ninety days after such judgment shall be rendered, then such recognizance shall be void; otherwise to remain in full force and effect.

It is therefore ordered that the attachment herein be and it is dissolved, and that the property taken by virtue thereof be restored to said defendant.

And be it also remembered that on the 26th day of May, A. D. 1877, it being then of the May term of said circuit court, by Hon. Wm. K. McAllister, one of the judges thereof, and entered of record in said cause; that is to say:

On motion of said plaintiffs, by their attorney, it is ordered by the court that the plea of said defendant filed herein, traversing the affidavit for the attachment writ issued in said cause, be and the same is hereby stricken from the files of said cause.

And be it remembered that on the day when the trial of the above-entitled cause was commenced before the Hon. Henry Booth, one of the judges of said court, to wit, on the 17th day of March, A. D. 1878, and before the trial of said cause was commenced the said defendant made a motion in said court, before said judge, to reinstate the plea filed by him in said cause on April 18, 1877, traversing the affidavit for the writ of attachment issued in said cause, which was commenced by attachment, and for leave to contest the grounds
43 on which said writ of attachment was issued before trying said cause on the merits, which affidavit was filed by said plaintiffs in said cause on the 16th day of March, A. D. 1877, and which pleas so traversing said affidavit was stricken from the files by said court on the 26th day of May, A. D. 1877; but the said court on the day and year aforesaid, to wit, on the 17th day of March, A. D. 1878, and before the commencement of said trial, overruled said motion so made by said defendant, to which action of said court in so overruling said motion the said defendant at the time and in open court duly excepted; that on the hearing of said motion so made as aforesaid no evidence, save the records and files of said court in said cause, was submitted by either of said parties, and said plea so traversing said affidavit for said writ of attachment was stricken from the files at the time hereinbefore stated on the ground that said attachment was, previously to the filing of said plea and on said defendant's motion, dissolved by the entry of the recognizance of record in said cause, given by said defendant as principal and Horace M. Singer and Thomas B. Rice as sureties, and said court denied said motion solely on and from the facts appearing on the face of the record & files in said cause. And be it also remembered that the account filed with the declaration in said cause, and for the recovery of the items whereof said suit was brought as amended, was and is as follows and not otherwise or different, to wit:

44 *Copy of account sued on.*

Mr. George W. Hill to Harding, Nissen and Barnum, Dr.

1876.			
January to February	8–10.	To taking deposition in St. Louis, Hill at-. Searle...	75 00
	14.	" preparing and trying case of " " Kibbe...	4,500 00
January	19.	" cash paid for copy of deed	2 00
	29.	" attendance in court on motion in " " Wheat to strike pleas from file	5 00
February	14.	" demurrer to declaration in Wheat vs. Hill sustained and judgment vs. plaintiffs	5 00
March	4.	" attendance on superior court on motion to file new declaration in Wheat v. Hill	5 00
	21.	" drawing & filing pleas to amended declaration and dr'w'g affidavit of merits in Wheat v. Hill.	15 00
April	12.	" vacating judgment " " .	10 00
	17.	" attendance in criminal court	10 00
	20.	" " " " "	5 00
July	8.	" " " " "	10 00
Sept.		" trial notices in four suits in U. S. court	10 00
"		" trip to Quebec [($100) this is paid]	
October	2	" retainer and plea in suit of K. K. Turner of malprosecution	100 00

	16.	To attendance in crim. c't & pr'p'r'g & serving notices of witnesses					7 00	
	19.	"	"	"	"	"	5 00	
	21.	"	"	"	"	" & drawing affidavit of Reed	10 00	
	27.	"	"	"	"	" & visits to VanArman's office	15 90	
	30.	"	"	"	"	"	10 00	
November	2.	"	"	"	"	"	5 00	
	9.	"	"	" U. S.	"	" watching call	10 00	
	11.	"	"	"	"	" passing cases	10 00	
November to December.		" preparing & trying forgery case v. Turner in criminal court, & consultations with witnesses, associate counsel, &c					1,500 00	8,614
45		To work, labor, and services as attorneys					10,000	
		" money paid, laid out, and expended					10,000	
		" money had and received to and for the use of the plaintiffs					10,000	
		" money due for interest and forbearance					10,000	
		" labor, services, and material					10,000	

And the plaintiffs on the trial of said cause before said judge and jury offered and introduced evidence tending to prove all of the items of said account, and the defendant on said trial offered and introduced evidence under his plea of the general issue filed April 18, 1878, in denial of said evidence of said plaintiffs, and the said items of said account are the only matters which were or are involved in said cause, and on which the verdict hereinafter mentioned by said court was founded.

The jury impaneled in said cause on the 12th day of April, A. D. 1878, and of the March term of said circuit court of that year, retired, and after deliberation brought in this verdict, in the following words and figures:

We, the jury, find the issue for the plaintiffs and assess the damages at thirty-five hundred dollars ($3,500.00).

CHARLES E. HULL,
Foreman.

And thereupon, and on the same day and year last aforesaid,
46 said defendant entered his motion in said cause for a new trial thereof, and for cause why such motion should be granted afterwards, on May 11, 1878, filed in said cause in writing, the following point, showing why said motion for a new trial should be granted, to wit:

Circuit court of Cook County.

STATE OF ILLINOIS,
Cook County, ss:

GEORGE T. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL.
} Action of assumpsit.

In support of the motion for a new trial heretofore made in this cause, the defendant files the following reason:

The court erred in denying the motion of the defendant to restore or reinstate his plea, traversing the facts stated in the affidavit for the attachment.

Afterwards, on April 20, 1878, plaintiffs, by their counsel, upon notice

duly given to defendant's counsel, called up for argument and disposal said motion of defendant for a new trial, but said defendant's counsel insisted upon and obtained from the court a delay of three weeks until May 11, 1878, for the court's action upon said motion for a new trial, plaintiffs, by their counsel, objecting to said postponement.

47 And afterwards, and before any judgment was rendered on said verdict in said cause, and before any other or further proceedings were had or taken in said cause, and on the seventh (7th) day of May, A. D. 1878, it being then of the April term of said court for that year, the said defendant filed in said cause with the clerk of this court a certificate in words and figures following:

In the district court of the United States for the northern district of Illinois.

In the matter of George W. Hill, by whom a petition for adjudication of bankruptcy was filed on the 22d day of April, A. D. 1878. In bankruptcy. At Chicago, in said district, on the first day of May, A. D. 1878, before Homer N. Hibbard, esq., register in bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Homer N. Hibbard, one of the registers in bankruptcy of said court, upon good proof before me taken, do find that the said George W. Hill has become a bankrupt within the true intent and meaning of the Revised Statutes of the United States, Title LXI, bankruptcy,

48 and amendments thereof, and I do hereby declare and adjudge him a bankrupt.

Witness my hand at Chicago, in said district, on the first day of May, A. D. 1878.

H. N. HIBBARD,
Register in Bankruptcy.

In the district court of the United States for the northern district of Illinois.

In the matter of George W. Hill, bankrupt. In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Homer N. Hibbard, a register in bankruptcy in and for the said northern district of Illinois, do hereby certify that the above and foregoing hereunto attached is a true copy of the adjudication of bankruptcy on debtor's petition in the above-entitled manner as the same remain in my office.

In witness whereof I have, at the city of Chicago, in said district, hereunto set my hand this 1st day of May, A. D. 1878.

H. N. HIBBARD,
Register in Bankruptcy.

And afterwards, to wit, on the eleventh (11th) day of May, A. D. 1878, and before any other proceedings were had or taken in said cause,

49 in said circuit court and before said motion of said defendant for a new trial had been argued or disposed of, the said defendant having given to the said plaintiffs one day's notice in writing in this behalf, suggested to said circuit court and on the record thereof before the said judge thereof, that said George W. Hill, defendant, had been, and on the first (1st) day of May, A. D. 1878, was adjudicated a bankrupt on his

own petition by the district court of the United States for the northern district of Illinois, sitting as a bankrupt court, and made a motion in said circuit court before said judge and in said cause to stay further proceedings in said cause in said circuit court to await the determination of said court of bankruptcy on the question of the discharge of said George W. Hill in bankruptcy, and said defendant at the same time and on the hearing of his said motion for such stay of proceedings, presented to said circuit court, without objection thereto, the aforesaid certificate of H. N. Hibbard; and it not being denied or questioned by any one that said George W. Hill had been adjudicated a bankrupt as aforesaid, counsel for plaintiffs and for defendants argued said motion for stay of proceedings on the basis that said fact of the
50 bankruptcy of said George W. Hill existed as stated in said certificate, and the court denied said motion on the basis that said fact of bankruptcy did exist.

Whereupon plaintiffs, by their counsel, insisted upon the taking up of defendant's said motion for a new trial first in order, but the court determining otherwise, after hearing arguments of counsel on said motion for said stay of proceedings, overruled the same, to which action of said circuit court in so overruling said motion for said stay of proceedings, the said defendant, at the time the same was taken in open court, duly excepted. And thereupon afterwards, and on the same day, the said motion of said defendant for a new trial in said cause came on to be heard before said circuit court, the same judge presiding, and said circuit court, after hearing arguments of counsel on said motion for a new trial, overruled the same and rendered a judgment on said verdict of said jury, to which action of said circuit court in so overruling said motion for a new trial, and in rendering judgment on said verdict in favor of said plaintiffs and against said defendant, said defendant at the time the same was taken in open court duly excepted.

And now, forasmuch as the matters and things aforesaid do not appear of record in said cause in said court, the said defendant
51 hereby tenders to the said judge, the Hon. Henry Booth, who tried said cause, this bill of exceptions in said cause, and prays that the said judge may sign and seal the same, so as to make the matters and things aforesaid a part of the record of said cause in said circuit court, which is accordingly done on this 25 day of June, A. D. 1878.

[SEAL.] HENRY BOOTH, *Judge.*

STATE OF ILLINOIS,
Cook County, ss:

I, Jacob Gross, clerk of the circuit court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of certain papers filed, and all proceedings had and entered of record in a certain cause lately pending in said court, on the common law side thereof, between George F. Harding et al., plaintiffs, and George W. Hill, defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 13th day of September, 1878.

[L. S.] JACOB GROSS, *Clerk.*

52 In the appellate court for the first district of the State of Illinois, October term, A. D. 1878.

GEORGE W. HILL, APPELLANT,
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, appellees.

And the said appellant, George W. Hill, by Brandt & Hoffman, his attorneys, comes and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The court erred in not granting the motion of appellant to restore the pleas traversing the statements contained in the affidavit for attachment, filed in said cause, and in not permitting appellant to litigate the question as to whether the cause for attachment alleged in said affidavit existed.

2nd. The court erred in refusing appellant's motion to stay all proceedings in said cause to await the determination of the court of bankruptcy on the question of the discharge of appellant in bankruptcy.

3rd. The court erred in rendering a judgment in said cause, said appellant having before the time of the rendition of said judgment been adjudicated a bankrupt under the bankrupt law of the United States.

53 4th. The court erred in denying appellant's motion for a new trial.

Wherefore appellant prays that the judgment aforesaid may be reversed.

BRANDT & HOFFMAN,
Appellant's Attorneys.

In appellate court, first district, Illinois.

GEORGE W. HILL, APPELLANT,
vs.
GEORGE F. HARDING, L. J. J. NISSEN AND William H. Barnum.
207. Appeal. Cook circuit.

I, Eli Smith, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached, and marked A, is the original transcript of record filed in this court on the 15th day of October, A. D. 1878, by said George W. Hill, appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 7th day of July, A. D. 1879.

[L. S.] ELI SMITH,
Clerk of Appellate Court, 1st Dist.

(Endorsed as follows:) A. Filed Oct. 15, 1878. Eli Smith, clerk. Filed Jul. 22, 1879. E. F. Dutton, clerk.

54 At a term of the appellate court, begun and held at Chicago, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, within and for the first district of the State of Illinois.

Present, Hon. Theo. D. Murphy, presiding justice; Hon. Geo. W. Pleasants, justice; Hon. Jos. M. Bailey, justice.

Be it remembered that on the 19th day of November, A. D. 1878, the

same being one of the days of the October term, A. D. 1878, of said court, the following among other proceedings were had and entered of record, to wit:

GEORGE W. HILL
vs.
GEORGE F. HARDING, L. J. J. NISSEN AND William H. Barnum. } No. 207. Appeal. Cook circuit.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that
55 it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error.

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said George F. Harding, L. J. J. Nissen, and William H. Barnum, appellees, recover of and from the said George W. Hill, appellant, their costs by them in this behalf expended, to be taxed, and that they have execution therefor.

GEORGE W. HILL
vs.
GEORGE F. HARDING ET AL. } Appeal. Cook circuit.

This day came again the said appellant by his counsel, and prayed an appeal in said cause to the supreme court, and the court being fully advised in the premises doth allow said appeal on condition, that said appellant doth within thirty days from date execute a good and sufficient appeal bond in said cause, in the penal sum of five thousand dollars, with surety thereto to be approved by this court.

56 And thereupon on the third day of December, A. D. 1878, a certain order was made and entered of record, and a certain appeal bond filed in said cause, which said order and appeal bond are in the words and figures following, to wit:

GEORGE W. HILL
vs.
GEORGE F. HARDING ET AL. } Appeal. Cook circuit.

This day came the said appellant by counsel, and presented his appeal bond in said cause to the supreme court, with H. M. Singer and Thomas B. Rice as sureties; and the court, after an examination of said sureties, being fully satisfied as to their qualifications, doth order that said bond be and it is hereby approved and filed.

Appeal bond.

Know all men by these presents that we, George W. Hill, Horace M. Singer, and Thomas B. Rice, of the county of Cook and State of Illinois, are held and firmly bound unto George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, also of the same county and State, in

the penal sum of five thousand dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents. Witness our hands and seals this twen-
57 tieth day of November, A. D. 1878.

The condition of the above obligation is such that whereas the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, did, on the eleventh day of May, A. D. 1878, in the circuit court of Cook County, in the State aforesaid, and of the April term thereof, A. D. 1878, recover a judgment against the above bounden George W. Hill for the sum of thirty five hundred dollars, besides costs of suit, from which said judgment of the said circuit court of Cook County the said George W. Hill prayed for and obtained an appeal to the appellate court within and for the first district of the State of Illinois, which said last mentioned court, on the nineteenth day of November, A. D. 1878, entered an order affirming said judgment in all things, and also adjudged that said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum recover of and from said George W. Hill their costs in that behalf expended, from which said order and judgment of said appellate court said George W. Hill has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said George W. Hill shall duly prosecute his said appeal to said supreme court with effect, and, moreover, pay the amount of the judgments, costs, interest, and damages rendered against him by said circuit court and said appellate court, and to be rendered against him in case the said order and judgment of said appellate court shall be affirmed in said supreme court, then the above obligation
58 to be void; otherwise to remain in full force and virtue.

(Signed) GEORGE W. HILL. [SEAL.]
(") HORACE M. SINGER. [SEAL.]
(") THOMAS B. RICE. [SEAL.]

(Endorsed:) Approved and filed by order of court, Dec. 3d, 1878. Eli Smith, clerk.

I, Eli Smith, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of all orders entered of record and a certain appeal bond filed in the said appellate court in the above entitled cause.

In testimony whereof I have set my hand and affix the seal of the said appellate court, at Chicago, this 7th day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

ELI SMITH,
Clerk of the Appellate Court of the First District.

Cl'k fee, 3.00.

59 In the supreme court of the State of Illinois, northern grand division. September term, A. D. 1879.

GEORGE W. HILL, APPELLANT,
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, appellees.

And now comes said appellant, by Brandt & Hoffman, his attorneys, and says that in the records and proceedings aforesaid, viz, in the

record of the proceedings in the circuit court of Cook County, Illinois, and in the record of the proceedings of said appellate court for the first district of Illinois, there is manifest error, in this, to wit:

1st. The said circuit court erred in not granting the motion of appellant to restore the plea traversing the statements contained in the affidavit for attachment filed in said cause and in not permitting appellant to litigate the question as to whether the cause for attachment alleged in said affidavit existed.

2nd. The said circuit court erred in refusing appellant's motion to stay all proceedings in said cause to await the determination of the court of bankruptcy on the question of the discharge of appellant in bankruptcy.

3rd. The said circuit court erred in rendering a judgment in said cause, said appellant having before the time of the rendition of
60 said judgment been adjudged a bankrupt under the bankrupt laws of the United States.

4th. The said circuit court erred in denying appellant's motion for a new trial.

5th. The said appellate court erred in affirming the judgment of said circuit court when it should have reversed the same.

Wherefore said appellant prays that said judgment of said circuit court and said judgment of said appellate court may *be* both be reversed.

BRANDT & HOFFMAN,
Attorneys for Appellant.

(Endorsed as follows:) Filed Jul' 22, 1879. E. F. Dutton, clerk.

61 And be it remembered that afterwards, to wit, on the 10th day of September, A. D. 1879, the same being one of the days of the September term, 1879, of said court, the following among other proceedings was had and entered of record in said court as follows, to wit:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum.
} 45. Appeal from appellate court first district.

Now on this day this cause coming on for a final hearing on the regular call of the docket, and it appearing to the court here that a transcript of the records and proceedings of the courts below has been filed herein, together with the abstracts and briefs required by appellant to be filed, in accordance with the rules of the court in that behalf made and provided:

It is therefore considered by the court that this cause be now taken under advisement.

62 And be it further remembered, that afterwards, to wit, on the 18th day of November, A. D. 1879, there was filed in the office of the clerk of the said supreme court the opinion of the court in said cause, which said opinion is in words and figures following, to wit:

63 MULKEY, J.:

A reversal of the judgment of the appellate court is urged upon two grounds.

It is claimed, in the first place, that the circuit court erred in denying appellant's motion for a stay of proceedings in that court until the ques-

tion of appellant's discharge as a bankrupt could be determined in the district court.

Secondly, it is insisted that if appellant was not entitled to a stay of proceedings, then his motion for a new trial should have been granted, and that it was error in the circuit court to refuse it. We will consider these positions in the inverse order in which they are made. By reference to the motion for a new trial it will be perceived that the only ground upon which the motion was based was the action of the court in striki g appellant's plea in abatement from the files.

The 14th sec. of chapter 11 of the Revised Statutes of 1874, entitled attachments, provides as follows: "Any defendant in attachment desiring the return of the property attached, may at any time, except in term time, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security in a sum to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages, and costs of suit, conditioned that the de-
64 fendant will pay the plaintiff the amount of the judgment and costs that may be rendered against him in that suit on a final trial, within ninety days after such judgment shall be rendered. In term time a recognizance, in substance as aforesaid, may be taken in open court and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered, and execution issued as in other cases of recognizance.

"In either case the attachment shall be dissolved and the property taken restored and all previous proceedings either against the sheriff or against the garnishees set aside and the cause shall proceed as if the defendant had been seasonably served with a writ of summons."

The recognizance entered into by appellant and his sureties in this case was in strict conformity with the provisions of the section of the statute just cited, and when so taken and approved by the court, and the order dissolving the attachment was duly entered, character of the suit as a proceeding in rem was thereby completely changed.

The suit thereupon became a proceeding in personam as completely as if it had been originally commenced by an ordinary summons and no attachment had ever been sued out; and the qualified lien which
65 appellees acquired by the levy of the attachment was forever gone. This being so, no possible good could have resulted from an enquiry as to whether the attachment was properly or improperly sued out.

Suppose the plea had been restored and an issue formed thereon had been tried and found in favor of appellant, what judgment could the court have rendered thereon? Certainly not "that the writ of attachment be quashed," for that was no longer before the court. The attachment was already dissolved and the writ itself was not only functus officio, but its previous effect and operation were completely annihilated by the entering into and approval of the recognizance and the order dissolving the attachment, and such a judgment therefore would have been an idle, useless ceremony, without any effect whatever upon the suit in question.

But outside of this, was appellant in a position to make this motion at the time it was interposed?

The qualified lien which appellees acquired by the levy of their attachment was by the voluntary act of appellant completely destroyed, the attachment dissolved, and the security for their claim which the attachment lien upon the land afforded was wholly lost to appellees. Upon

the dissolution of the attachment, the land upon which it had
66 been levied being freed from the lien, appellant was at once enabled to sell or otherwise dispose of it so as to completely defeat appellees' claim in the event his sureties on the recognizance should prove worthless.

It will be observed also that this recognizance was entered into on the 28th day of March, 1877, and on the 17th of April following, the plea in abatement was filed, and on the 26th of the following month it was stricken from the files, on motion of appellees. To the action of the court in striking this plea from the files, so far as the record shows, there were no objections made or exception taken on the part of appellant, and no question was made about it until the 17th day of March, 1878, nearly ten months afterwards, when, for the first time, appellant questioned the action of the court in striking the plea from the files, by the entry of his motion to reinstate it.

In the meantime appellant became a bankrupt, and for aught the court could know appellees' witnesses, to prove the truth of the affidavit for the attachment, may have died or scattered into parts unknown.

Even admitting that under some circumstances, which we do not by any means, that a defendant in an attachment, after having entered into a recognizance like the one under consideration, can afterwards question the grounds upon which the attachment was issued, we are very clear that appellant had no right to do so under the circumstances in this case.

67 Ordinarily where a pleading of any kind has been once properly stricken from the files it is a matter of discretion whether the court will on application reinstate it, and nothing but a manifest abuse of that discretion is reviewable in an appellate court.

On the other hand, it is well settled that if the court makes an improper ruling upon a motion to strike a plea from the files, it is the duty of the party dissatisfied with the action of the court to except to its ruling, and if he fails to do so he must be deemed to have waived the error, and if once waived it is a matter of pure discretion whether the court will reconsider its action. (2 Tidd, 788; 1 Am. ed. Snell v. Trustees of the society of the Methodist Episcopal Church of Clinton, &c., 58 Ill., 29; Reed v. Horne, 73 Ill., 598.) And where the grounds of the motion, together with the exception, have not been preserved, as in this case, by a proper bill of exceptions, this court cannot consider the question, and all presumptions are in favor of the action of the court below.

It follows, therefore, that the circuit court committed no error in refusing to grant a new trial, for the reason assigned in the motion.

The remaining question to be considered, and the one mainly
68 relied upon by appellant for reversal, is: Was it error in the circuit court to proceed to judgment after appellant had been adjudicated a bankrupt, and a properly certified record of such adjudication had been filed in the attachment cause and a formal motion for a stay of proceedings entered. We have never had occasion to pass upon this precise question, yet it is by no means a new one to the courts of the country. It has been passed upon both in the State and Federal courts, and different conclusions have been reached. Its determination involves the consideration of some of the provisions of the late bankrupt act. Section 5106 of the Revised Statutes of the United States provides as follows:

"No creditor whose debt is provable shall be allowed to prosecute to final judgment in any suit at law or equity therefor against the bank-

rupt until the question of the debtor's discharge shall have been determined; any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

69 Section 5119 provides that a discharge in bankruptcy duly granted (with certain exceptions mentioned, not important here), "shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy."

Section 5044 provides that "as soon as an assignee is appointed and qualified to judge, or where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on *mesne* process, as the property of the debtor, and shall dissolve any such attachment made within four months next preceeding the commencement of the bankruptcy proceedings." And section 5118 provides that "no discharge shall release, discharge, or effect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

These provisions of the act of Congress should be considered together in the light of the general objects and purposes of the National

70 Legislature, in establishing a general bankrupt system, and should be so construed as to promote and effectuate the manifest objects of the act, although such construction may seem in conflict with the literal phraseology of some particular section of the act.

While one of the chief objects of Congress, in establishing a general bankrupt law, was doubtless to place the general creditors of the bankrupt upon terms of perfect equality, and secure an equal division of the bankrupt's estate among them, in proportion to their respective claims, yet it cannot reasonably be supposed that it was intended, in making this distribution, to at all interfere with the rights of such creditors of the bankrupt as, by superior diligence had in good faith, secured their claims against him by acquiring liens upon his estate. In pursuance of this general intent, it is expressly provided in section 5052 that "no mortgage of any vessel or of any other goods or chattles made as security for any debt, in good faith, for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy." On the other hand, all attempts by the bankrupt or one in contemplation of bankruptcy to give one creditor a preference over another are, by section 5021, declared to be acts of bankruptcy, and

71 fraudulent and void as against the assignee. And by section 5046, all property conveyed by the bankrupt in fraud of his creditors is made to vest absolutely in his assignee.

And for the purpose of more effectually preventing one creditor from obtaining an undue advantage over another through the instrumentality of legal proceedings, in the distribution of the bankrupt's estate, it

was expressly provided as shown by section 5044, above cited, that the assignment of the bankrupt's estate should dissolve any attachment sued out within four months next preceeding the commencement of the bankruptcy proceedings.

Here we see law-makers distinguishing attachments commenced within four months from the time of the institution of proceedings in bankruptcy from attachments commenced before that time. The effect of the assignment upon the class of attachments expressly mentioned is clearly and specifically declared. The assignment ipso facto dissolves such attachments. With respect to attachments made more than four months next preceeding the commencement of the proceedings in bankruptcy, the statute, so far as any express provisions is concerned, is silent; yet there can be as little doubt as to the intention of the lawmakers in the one case as in the other. When it is declared that the assignment shall dissolve all attachments made within a given period, the irresistable inference is that all attachments not made
72 within the specified period are not dissolved by the assignment.

Now, if it was not intended that the latter class of attachments should be dissolved by the assignment, it must have been intended that all persons who had, in good faith, more than four months before the commencement of the proceedings in bankruptcy, acquired attachment liens upon the bankrupt's property, should have the benefit of such liens, and it would therefore follow that any construction given to section 5106, above cited, which would deprive the attaching creditor of the benefit of such lien, cannot be the true construction. Since an attachment lien is always defeated by a failure to obtain judgment, and the discharge of the bankrupt destroys the right of action, so that no judgment can be obtained after such discharge, it is manifest that to hold that this section applies to attachments sued out more than four months before the commencement of proceedings in bankruptcy would have the effect, in all cases where the bankrupt ultimately obtained his discharge, of defeating the attachment lien altogether.

It is true the words of the section are very broad, and to construe and enforce them literally would defeat an attachment lien like the one supposed. The language is, "No creditor whose debt is provable shall be allowed to prosecute to final judgment," &c.

73 The claim of appellees was certainly provable under the bankrupt act, and the application to stay proceedings is conceeded to have been made before judgment; hence it cannot be denied that appellees were brought within the literal terms of the section of the act in question.

But, as already observed, to construe and enforce this section according to its literal terms, would, in all cases of the kind supposed, defeat that class of attachment liens which the act, taken as a whole, manifestly intended to protect.

We concede the binding authority of the section in question upon State courts as well as national, and in an appropriate case it should be enforced just like any other provision of law. But the right and duty to enforce the law, whether it be Federal or State, necessarily involves the right and duty to construe it.

Every court must necessarily determine what the law is before it can apply it. We therefore hold, after a very careful consideration of the various provisions of the bankrupt act, that in all cases where an attachment has in good faith been sued out more than four months—as was the case here—before the commencement of the proceedings in bankruptcy, by which the attaching creditor acquires a valid lien

upon the bankrupt's estate, the attaching creditor may, notwithstanding the provisions of section 5106 of the bankrupt act and the
74 mitted adjudication of the defendant as a bankrupt, proceed to judgment in the State court, in order to perfect and render available his lien upon the attached estate. He is not, in such case, bound to wait till the bankrupt is discharged. To compell him to do so would be to force him to pursue a course which would result in the loss of his debt; would be to deprive him of a right which the law-makers manifestly intended to protect; finally would be to practically place all attachments on the same footing.

If the attaching creditor, who commenced proceedings more than four months before the commencement of procoedings in bankruptcy, is compelled to suspend all further proceedings in his attachment suit, and quietly stand by till the bankrupt obtains his discharge, and thereby completely destroys his right of action, so that he cannot recover a judgment at all, how much better off is he than the attaching creditor who sued out his attachment within the four months? No better. We repeat, to give the section such a construction would be practically to place all attachments upon the same footing.

The section in question should in all cases be so construed and enforced as to protect rather than defeat vested rights, keeping in view the general objects and purposes of the bankrupt act. In perfect harmony with the principles here announced in the case of Byers et
75 al. v. National Bank of Vincennes (85 Ill., 423), that case holds that where two or more are sued in a State court, and pending such suit one of the defendants becomes a bankrupt, that the plaintiff may, notwithstanding the section in question, proceed to judgment.

But it may be urged that, in the present case, the suit had ceased to be an attachment proceeding. That is true; but the same principle which forbids a stay of the proceedings in attachment cases applies with equal force to the case at bar. The security for the judgment which the plaintiffs were seeking to recover could only have been made available by the actual rendition of the judgment. To have stayed the proceeding until the defendant received his discharge would have been, in effect, to have deprived him of his security altogether—in short, a loss of his claim. The bankrupt act was not intended to relieve third parties of just habilities to the creditors of the bankrupt, and it should not be so construed as to give it that effect.

It follows from the view we have taken that the circuit court committed no error in refusing to stay the proceedings to await the determination of the question of appellant's discharge as a bankrupt.

There are other grounds upon which this case might well have been affirmed, but we deemed it best to dispose of it upon its merits,
76 and have accordingly done so. The judgment of the appellate court is affirmed.

Judgment affirmed.

SCOTT J.:

I do not concur in the construction given to the sections of the bankrupt act cited in the opinion of the court.

And afterwards, to wit, on the 18th day of November, 1879, the following, among other proceedings, was had and entered of record in said court, to wit:

77 At a supreme court, begun and held at Ottawa, on Tuesday,

the second day of September, in the year of our Lord one thousand eight hundred and seventy-nine, within and for the northern grand division of the State of Illinois.

Present, Pinkney H. Walker, chief justice;
" T. Lyle Dickey, associate justice;
" John M. Scott, " "
" John H. Mulkey, " "
" Benjamin R. Sheldon, " "
" Jno. Scholfield, " "
" Alfred M. Craig. " "

In vacation after September term, A. D. 1879, to wit, on November 18, 1879. Appeal from appellate court, 1st district.

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM. } No. 45.

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error: Therefore it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellees recover of and from the said appellant their costs, by them in this behalf expended, and that they have execution therefor.

78 I, Everell F. Dutton, clerk of the supreme court, in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the record and proceedings in the above entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 29th day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] E. F. DUTTON,
Clerk of the Supreme Court.

⁂34.

79 I do hereby certify that the annexed certificate and attestation of Everell F. Dutton are in due form of law, and I do further certify that he is the clerk of the supreme court for the northern grand division of the State of Illinois, and that his signature to said certificate is genuine.

Given at Rushville, Ill., December 1st, 1879.

P. H. WALKER,
Chief Justice of the Supreme Court of the State of Illinois.

80 Know all men by these presents that we, George W. Hill, principal, and Horace M. Singer and Thomas B. Rice, sureties, are held and firmly bound unto George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the full and just sum of five thousand dol-

lars, to be paid to the said George F. Harding, Lawrence J. J. Nissen, and William B. Barnum, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately, at a term of the supreme court of the State of Illinois in a suit depending in said court between George W. Hill, appellant, and George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, appellees, a judgment was rendered against the said George W. Hill, and the said George W. Hill having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, citing and admonishing them to be and appear at a Supreme
81 Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said George W. Hill shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE W. HILL. [L. S.]
HORACE M. SINGER. [L. S.]
THOMAS B. RICE. [L. S.]

Sealed and delivered in presence of—
GEORGE W. BRANDT.

JAN. 6, 1880.

Approved & to operate as a supersedeas by—
JOHN M. HARLAN,
Circuit Justice.

82 Supreme court.

STATE OF ILLINOIS,
Northern Grand Division:

I, Everell F. Dutton, clerk of the supreme court aforesaid, do hereby certify that the above and foregoing is a true copy of an instrument of writing on file in my said office.

Witness my hand and official seal this 21st day of January, A. D. 1880.

[SEAL.] E. F. DUTTON.

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George W. Hill, appellant, and George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exer-

cised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the de-
84 cision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixth day of January, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed, & to operate as supersedeas.
Jan. 6, '80.

JOHN M. HARLAN,
Circuit Justice.

85 Supreme court.

STATE OF ILLINOIS,
Northern Grand Division:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM.

I herewith transmit a true and full copy of the record and proceedings in the above entitled cause, as I am herein commanded.

Witness my hand and the seal of said court, at Ottawa, this 20th January, A. D. 1880.

[SEAL.] E. F. DUTTON, *Clerk.*

86 The United States of America to George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein George W. Hill is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John M. Harlan, associate justice of the Supreme Court of the United States, this sixth day of January, in the year of our Lord one thousand eight hundred and eighty.

JOHN M. HARLAN,
Circuit Justice.

87 I hereby acknowledge service of the within citation on said defendants in error, George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, and hereby enter my appearance as attorney for said defendants in error in said cause, January 12th, A. D. 1880, without waiving the right to make this appearance special for a motion to dismiss said writ of error for any legal reason.

ADOLPH MOSES,
Att'y for Def'ts in Error.

88 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

GEORGE W. HILL, PLAINTIFF IN ERROR,
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, defendants in error.

And now comes said George W. Hill, plaintiff in error, by George W. Brandt, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The said circuit court of Cook County, of the State of Illinois, erred in denying the motion of said plaintiff in error to stay all proceedings in said cause to await the determination of the court of bankruptcy on the question of the discharge of said plaintiff in error in bankruptcy, and the appellate court for the first district of the State of Illinois and the superior court of the State of Illinois erred in ratifying and approving said action of said circuit court.

2d. The said circuit court of Cook County, State of Illinois, erred in rendering a judgment in said cause against said plaintiff in error, said plaintiff in error having before that time been adjudicated a bank-

89 rupt under the bankrupt law of the United States, and having, before said judgment was rendered, moved said circuit court for a stay of all proceedings in said cause to await the decision of the court of bankruptcy on the question of the discharge of said plaintiff in error in bankruptcy, and the appellate court for the first district of the State of Illinois and the supreme court of the State of Illinois erred in ratifying and affirming said action of said circuit court.

Wherefore said plaintiff in error prays that action and judgments of said circuit court, said appellate court, and said supreme court of the State of Illinois be reversed.

GEORGE W. BRANDT,
Attorney for Plaintiff in Error.

(Indorsed:) State of Illinois, supreme court, northern grand division. G. T. Harding et al. vs. Hill.

(Indorsement on cover:) No. 735. George W. Hill, plaintiff in error, vs. George F. Harding, Lawrence J. J. Nissen, & William H. Barnum. Illinois sup. court. Filed 4th February, 1880.

OFFICE SUPREME COURT U.S.
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IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

GEORGE W. HILL,
Plaintiff in Error,
v.
GEORGE F. HARDING, WILLIAM H. BARNUM AND LAWRENCE J. J. NISSEN,
Defendants in Error.

No. 177.

Error to Supreme Court of Illinois.

Brief and Argument for Plaintiff in Error.

GEORGE W. BRANDT,
ATTORNEY FOR PLAINTIFF IN ERROR.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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STATEMENT.

This was an action of assumpsit, commenced on the 16th day of March, A. D. 1877, by defendants in error against plaintiff in error, in the Circuit court of Cook county, Illinois, to recover the value of certain legal services. The suit was commenced by attachment, founded on an affidavit of defendant in error Barnum, in which he stated that there was due defendants in error the sum of $8,264., and that plaintiff in error was "about fraudulently "to conceal, assign or otherwise dispose of his property "or effects, so as to hinder or delay his creditors." (*Record, p. 3.*)

The statutes of Illinois, in the chapter relating to attachments, provide, among other things, as follows, viz:

§ 1. "That in any court of record having competent "jurisdiction a creditor may have an attachment against "the property of his debtor, or that of any one or more "of several debtors, when the indebtedness exceeds $20., "in any one of the following cases.* *Eighth*—Where "the debtor is about fraudulently to conceal, assign or "otherwise dispose of his property or effects, so as to "hinder or delay his creditors."

§ 2. "To entitle a creditor to such writ of attachment, "he or his agent or attorney shall make and file with the "clerk of such court an affidavit setting forth the nature "and amount of the indebtedness, after allowing all just "credits and set-offs, and one or more of the causes men-"tioned in the preceding section, and also stating the place "of residence of the defendants, if known, and if not "known, that upon diligent inquiry the affiant has not "been able to ascertain the same." (Revised Statutes of Illinois, 1874, pp. 152–3.

It was in pursuance of these sections of the statute that the attachment in the case at bar was issued. It was levied on certain property belonging to plaintiff in error. (*Record, p. 5.*) The attachment having been thus issued and levied, the property seized could be released from the levy in either of two ways, for which the statute provided as follows:

§ 14. "The officer serving the writ shall take and re-"tain the custody and possession of the property attached, "to answer and abide by the judgment of the court, un-"less the person in whose possession the same is found "shall enter into bond and security to the officer, to be

"approved by him in double the value of the property so "attached, with condition that the said estate and prop- "erty shall be forthcoming to answer the judgment of "the court in said suit. The sheriff or other officer shall "return such bond to the court in which the suit is "brought on the first day of the term to which such at- "tachment is returnable."

§ 15. "Any defendant in attachment desiring the re- "turn of the property attached, may at any time, except "in term time, at his option, instead of, or in substitution "for the bond required in the preceding section, give like "bond and security, in a sum sufficient to cover the debt "and damages sworn to in behalf of the plaintiff, with all "interest, damages and costs of suit, conditioned that the "defendant will pay the plaintiff the amount of the judg- "ment and costs which may be rendered against him in "that suit, on a final trial, within ninety days after such "judgment shall be rendered. In term time, a recogni- "zance, in substance as aforesaid, may be taken in open "court and entered of record, in which case the court "shall approve of the security and the recognizance made "to the plaintiff, and upon a forfeiture of such recogni- "zance, judgment may be rendered and execution issued "as in other cases of recognizance. In either case *the* "*attachment shall be dissolved* and the property taken "restored, and all previous proceedings, either against the "sheriff or against the garnishees set aside, and the cause "shall proceed as if the defendant had been seasonably "served with summons." (Revised Statutes of Illinois, 1874, p. 154.)

Plaintiff in error chose to avail himself of the provisions of said section fifteen, and having procured two sureties, who were willing to assume such an obligation as was

therein contemplated, he, as principal, together with Horace M. Singer and Thomas B. Rice, as sureties, entered into a recognizance conditioned for the payment of "the judgment and costs, which may be rendered against "him (Hill) *in this suit* on a final trial thereof," etc., and the attachment was thereupon dissolved. (*Record, p. 6.*)

The attachment law of Illinois further provides, as follows:

§ 27. "The defendant may plead, traversing the facts "stated in the affidavit upon which the attachment issued, "which plea shall be verified by affidavit, and if, upon "the trial thereon, the issue shall be found for the plaintiff, the defendant may plead or demur to the action as "in other cases, but if found for the defendant, the attachment shall be quashed," etc.

On the 18th day of April, 1877, in pursuance of the foregoing section, plaintiff in error filed a plea, properly verified by affidavit, traversing the facts stated in the affidavit for attachment as cause why the attachment should issue, and denying the fraud charged therein. On the 26th day of May, 1877, this plea was on motion of defendants in error stricken from the files.

Afterwards, and on the 17th day of March, 1878, before the jury trial of this case commenced, plaintiff in error moved the Circuit court to reinstate this plea and for leave to contest the grounds on which the attachment was issued. But the Circuit court refused said motion, and plaintiff in error excepted. (*Record, pp. 9—11.*)

The case was thereupon tried on the plea of the general issue, and on the 12th day of April, 1878, a verdict of $3,500 in favor of defendants in error was rendered.

Plaintiff in error thereupon moved for a new trial on the ground that the court erred in refusing him leave to contest the grounds on which the writ of attachment issued.

Pending the motion for new trial, and on the 1st day of May, 1878, plaintiff in error was on his own petition adjudged a bankrupt by the District court of the United States, for the Northern District of Illinois.

On the 7th day of May, 1878, plaintiff in error filed in this cause and in said Circuit court a certificate of said bankruptcy. (*Record. p. 21.*)

Afterwards, and on the 11th day of May, 1878, before any other proceedings were had in this case, plaintiff in error, having given defendants in error one day's notice in writing, in that behalf, suggested to said Circuit court and on the record thereof, said bankruptcy of said plaintiff in error, and moved said Circuit court to stay all further proceedings in said cause, to await the determination of said court in bankruptcy on the question of the discharge of plaintiff in error as a bankrupt. On the hearing of said motion plaintiff in error presented to said Circuit court, without objection, the certificate of the register in bankruptcy, showing the bankruptcy of plaintiff in error, and it not being denied or questioned that plaintiff in error had been adjudged a bankrupt as aforesaid, the motion for a stay of proceedings was argued and decided on the basis that said fact of bankruptcy did exist. (*Record, pp. 21–2.*)

The Circuit court denied said motion for stay of proceedings and also overruled the motion for new trial, and on said 11th day of May, 1878, eleven days after plaintiff in error had been adjudged a bankrupt, rendered a judgment against him for $3,500 and costs of suit. To all of

which plaintiff in error duly excepted. (*Record, pp. 17, 22.*) This judgment was affirmed by the Appellate court for the First District of Illinois, and by the Supreme court of Illinois, and is now brought here by writ of error for review, the

ERROR ASSIGNED

being that the Circuit court of Cook county, Illinois, erred in denying said motion of plaintiff in error for a stay of proceedings to await the determination of the court in bankruptcy on the question of his discharge, and said Appellate court and said Supreme court of Illinois erred in approving said action of said Circuit court.

Brief of Authorities.

The statute governing the case:

Revised Statutes of the United States, § 5106.

General principles as to duty of court under this statute:

Bump on Bankruptcy (10 Edition), pp. 181–2.

Penny v. *Taylor*, 10 Bankruptcy Register, 200.

The Statute is binding on the courts of the several states:

In re Rosenberg, 3 Benedict, 17.

Delavergne v. *Farrand*, 1 Michigan, *nisi prius*, 90.

Cohen et al. v. *Duncan et al.*, 64 Georgia, 343.

McKay v. *Funk*, 37 Iowa, 661.

No matter what the state of the proceedings, they must stop when a motion for stay is made:

Bratton v. *Anderson*, 5 South Carolina R., 504.

National Bank of Clinton v. *Taylor*, 120 Mass., 124.

In re Metcalf, 2 Benedict, 78.

Page v. *Cole*, 123 Mass., 93, and cases therein cited.

If the sureties in the recognizance are compelled to pay this debt, plaintiff in error will be obliged to indemnify them and thus be deprived of the benefit of his discharge in bankruptcy:

Page v. *Russell*, 2 Maule & Sel., 551.
Taylor v. *Mills*, Cowper, 525.
Paul v. *Jones*, 1 Durn. & East., 599.
Welsh v. *Welsh*, 4 Maule & Sel., 333.
Buel v. *Gordon*, 6 Johnson, 126.
Woodward v. *Herbert*, 24 Maine, 358, and cases therein cited.
Ellis v. *Ham*, 28 Maine, 385.
Hankin v. *Bennett*, 8 Wels., Hurl. & Gor., 107.
Hinton v. *Acraman*, 2 Manning, Granger & Scott, 307.
Eastman v. *Hibbard*, 54 New Hampshire, 504.
McMullen v. *Bank of Penn Township*, 2 Pa. St. 493.
Wells v. *Mace*, 17 Vermont, 503.
Coke v. *Lewis*, 8 Pa. St. 493.
Emery v. *Clarke*, 2 J. Scott (N. S.), 582.
Comfort v. *Eisenbeis*, 11 Pa. St., 13.
Haddens v. *Chambers*, 2 Dallas (Pa.), 236.

Sureties are bound only by the strict terms of their engagements, and no intendments should be made against them:

Law v. *East India Company*, 4 Vesey, 824.
Long v. *Pike*, 27 Ohio St., 498.
Kingsbury v. *Westfall*, 61 New York, 356.

Stull v. *Hance*, 62 Ill., 55.
Miller v. *Stewart et al.*, 9 Wheaton, 680.
The People v. *Tompkins*, 74 Ill., 486, and cases therein cited.

A surety is under no moral obligation to pay the debt of his principal:

Winston v. *Fenwick*, 4 Stew. & Port. (Ala.), 269.
Harrison v. *Field*, 2 Washington (Va.), 136.
Pickersgilt v. *Lahens*, 15 Wallace, 140.
Pecker v. *Julius*, 2 Browne (Pa.), 31.
VanDerveer v. *Wright*, 6 Barb. (N. Y.), 547.
Risley v. *Brown*, 67 New York, 160.
Weaver v. *Shyzrock*, 6 Serg. & Rawle (Pa.), 262.
Rawstone v. *Parr*, 3 Russell, 539.
Kennedy v. *Carpenter*, 2 Wharton (Pa.), 344.
Other v. *Iveson*, 3 Drewry, 177.
Towue v. *Ammidown*, 20 Pick., 535.
Wood v. *Fish*, 63 New York, 245.

It was error in the Circuit Court to render a judgment, the effect of which was to charge the sureties in the recognizance:

Carpenter v. *Turrell*, 100 Mass., 450.
Payne v. *Able*, 7 Bush. (Ky.), 344.
Hamilton v. *Bryant*, 114 Mass., 543.
Martin v. *Kilbourn*, 12 Heiskell (Tenn.), 331.
Braley v. *Boomer*, 116 Mass., 527.

Odell v. *Wooten*, 38 Georgia, 224.
Page v. *Cole*, 123 Mass., 93.
Wolf v. *Stix*, 9 Otto (99 U. S.), 1.

The courts of Illinois should have enforced the law as it found it without any attempt at judicial legislation:

Jacob v. *United States*, 1 Brock., 520.
Putnam v. *Longley*, 11 Pick., 487, 490.
Denn v. *Reid*, 10 Pet., 524–7.
Denny v. *Merrifield*, 128 Mass., 228.

ARGUMENT.

THE MOTION FOR STAY OF PROCEEDINGS TO AWAIT THE DETERMINATION OF THE COURT IN BANKRUPTCY, ON THE QUESTION OF THE DISCHARGE OF PLAINTIFF IN ERROR AS A BANKRUPT, SHOULD HAVE BEEN GRANTED.

One of the sections of the bankrupt law, being section 5,106 of the revised statutes of the United States, provides that: "*No creditor* whose debt is provable *shall be al-* "*lowed* to prosecute to final judgment any suit at law or "in equity therefor against the bankrupt, until the ques- "tion of the debtor's discharge shall have been deter- "mined; and any such suit or proceedings *shall, upon the* "*application of the bankrupt, be stayed,* to await the "determination of the court in bankruptcy on the ques- "tion of the discharge, provided there is no unreasonable "delay on the part of the bankrupt in endeavoring to ob- "tain his discharge, and provided, also, that if the amount "due the creditor is in dispute, the suit, by leave of the "court in bankruptcy, may proceed to judgment for the "purpose of ascertaining the amount due, which amount "may be proved in bankruptcy, but execution shall be "stayed."

It would seem impossible to frame a more peremptory command by any words known to the English language. There is no room for equivocation or construction. The intent of the law makers is clear and expressed in unmistakable language: "*No creditor shall be allowed*" to

prosecute his suit, but the suit "*shall*, upon application of "the bankrupt, *be stayed*." This was the plain mandate of the law which was set at defiance in this case, and is the ground upon which the writ of error herein is based.

Concerning this section of the late Bankrupt Law, the result of the authorities is thus summarized in Bump on Bankruptcy (10 Edition, pp. 181–2.):

"The object of this provision is to prevent a race of "diligence between creditors, and to protect the bankrupt "from being harassed with suits while he is proceeding "in good faith to obtain his discharge, and until the "question of his discharge is determined, and he either "obtains it or is refused it, and to enable him to claim "protection as against such suits through his discharge, "if he obtains it. It applies to all cases where the personal "liability of the debtor is sought to be fixed or ascertained "by a final judgment pending the determination of the "question of his discharge. * * The provision for a "stay is addressed quite as much to the state courts as "to the courts of bankruptcy, and is applied and enforced "by the former quite as much as by the latter. A stay "in the state courts is obtained upon motion supported "by the production of a copy of the order of adjudica-"tion."

In *Penny* v. *Taylor*, 10 Bankruptcy Register, 200, HILL, J., said: "The constitutionality of the bankrupt law has "not and cannot be successfully assailed, and, by its pro-"visions, the declaration of bankruptcy, without more "enjoins the commencement of further prosecution of any "and all suits for the recovery of any demand provable "under the act, until the question of discharge shall have "been determined; and further provides that, upon the

"production of evidence of a declaration of bankruptcy, "the cause shall be suspended in the court in which it "may be pending, except when the amount in suit may "be disputed; in such case, *by order of the court of bank-* "*ruptcy*, the plaintiff may proceed to ascertain the amount "due by the judgment of the state court, but at that point "the proceedings are suspended until the question of dis- "charge is determined. This is done both to relieve the "bankrupt court and to convenience the parties, but *can* "*only be done by order of the bankrupt court, the forum* "*upon which, necessarily, all jurisdiction as to the bankrupt's* "*estate and the demands upon it are, immediately upon the* "*declaration of bankruptcy, conferred.* The practice is for "the bankrupt to suggest his brankruptcy; if not denied, "it is considered admitted; if denied, then he must estab- "lish it by proof. The effect of the declaration of bank- "ruptcy, as stated, is, of itself, an injunction against the "further prosecution of any suit or other proceedings to "enforce payment of a demand provable under the bank- "ruptcy proceedings, except in the case stated."

The mandate of this section bound the courts of the several states as fully as it bound the courts of the United States.

In the case of *In re Rosenberg*, 3 Benedict, 17, BLATCHFORD, J., when considering the provisions of this section, said, they "are addressed quite as much to the courts of "the states as to the bankruptcy tribunals, and are to be "applied and enforced by the former quite as much as by "the latter."

The above language was quoted with approval by a state court in *Delavergne* v. *Farrand*, 1 Michigan, *nisi prius*, 90, and all proceedings in the suit stayed accordingly.

In *Cohen et al.* v. *Duncan et al.*, 64 Georgia, 343, an application was made to stay proceedings in a state court, and they were thereupon stayed. The court, among other things, said: "The exemplification from the federal court was exhibited, and the act of congress in strict accordance with the constitution of the United States and therefore authoritative over the state courts, prohibits final judgment and declares that the suit shall be stayed on the application of the bankrupts. Of course the statute means that the application shall be made to the court where the suit is pending."

In *McKay* v. *Funk*, 37 Iowa, 661, it was held that no personal judgment could be rendered against a defendant after he had been adjudicated a bankrupt. And it was held to be error to enter a judgment in such a case with an order that no execution should issue pending the determination of the question of discharge. The court said: "After the motion was filed, *nothing ought to have been done further than the entering of an order staying proceedings.* But a judgment was rendered, which, however, was not to be enforced by execution till the further order of this court. *The law was not followed*, and the judgment against defendant, personally, was therefore erroneous, and must be reversed."

Many of the cases hereinafter referred to in which the authority of this section was recognized and its mandate obeyed were decided by state courts. The learned Supreme court of Illinois, while refusing to give effect to this section, yet in words recognized its authority over the state tribunals, and said: "We concede the binding authority of the section in question upon state courts as well as national." (*Record, p. 30*; *Hill* v. *Harding et al.*, 93 Ill., p. 87.) It is probably not necessary to

further elaborate the point that this provision of the bankrupt law was binding on the courts of the State of Illinois.

If final judgment had not been entered against the bankrupt, then, no matter what might have been the stage at which the case had arrived, all proceedings must have stopped from the moment the court in which the case was pending was notified of the fact of bankruptcy, and a motion for a stay was made. This was the necessary result of the language of the section and is illustrated by a variety of cases, among which are the following:

In *Bratton* v. *Anderson*, 5 South Carolina R., 504, where a judgment had been rendered by a court of the state, which was not a lien, and pending proceedings to make it a lien, the defendant went into bankruptcy, it was held that it was the duty of the state court immediately upon application of the defendant to suspend all further proceedings in the case.

In *National Bank of Clinton* v. *Taylor*, 120 Mass., 124, after a default had been entered against a defendant, he was adjudged a bankrupt, and filed in the case a copy of the adjudication in bankruptcy and a motion for a continuance. "The motion for a continuance was opposed by "the plaintiff, but the presiding judge ruled *that the court* "*had no discretion*, but was required by the bankrupt act "to continue the case, bankruptcy having been suggested "in proper form *before final judgment*, and ordered the "case to be continued." Afterwards the defendant obtained his discharge in bankruptcy, which he then pleaded in bar of the suit, and judgment was thereupon entered in his favor.

In the case of *In re Metcalf*, 2 Benedict, 78, judgment had been rendered against a defendant by the Supreme

court, and he took an appeal to the court of appeals of the State of New York. He was afterwards adjudged a bankrupt, and one of his sureties for the appeal having become insolvent, a motion was made in the state court that he furnish new surety or abandon the appeal. The defendant obtained from the bankrupt court an injunction, staying all proceedings in the state court. A motion was made to dissolve this injunction, but BENEDICT, J., after quoting a portion of the section now under consideration, said:

"This is a very clear provision, the object of which is "to prevent a race of diligence between creditors, and to "protect the bankrupt from being harassed with suits "pending the question of his discharge. It seems to ap- "ply to all cases where the personal liability of the debtor "is sought to be fixed or ascertained by a final judgment "pending the determination of the question of his dis- "charge, and, in my opinion, it applies to a case like the "present, where an action against one of the bankrupts is "pending in the court of appeals of the state, to which "an appeal had been taken by him prior to the filing of "the petition in bankruptcy. In such a case there is no "final judgment within the meaning of the bankruptcy "act; the debtor's liability has not been finally determined, "and there being no final judgment, the bankruptcy act "declares that the suit shall stop, pending the determina- "tion of the question of the bankrupt's discharge. The "option to endeavor to obtain a discharge in bankruptcy, "and, failing in that, to defend all undetermined personal "actions is a right given a debtor by the bankruptcy act, "under the constitution of the United States, and he is "entitled to be protected in that right by this court. But "it is said that the motion for further security, which has

"been noticed by the creditor in the actions pending in "the court of appeals, is not strictly a proceeding against "the bankrupt. I think otherwise. It is just the pro- "ceeding which will compel the bankrupt to determine, "pending his application for his discharge, whether to de- "fend the suit or allow a final judgment. But the bank- "ruptcy act does not permit him to be forced to decide "that question now. It declares that no such suit shall be "allowed to proceed until he has had a reasonable time to "obtain his discharge, if he can, and the mandate of the "act to this court is to stay such a proceeding, in what- "ever court it may be pending. My opinion, therefore, is, "that it is the clear duty of this court to maintain the in- "junction heretofore granted against the petitioners until "the bankrupt shall have had reasonable time to obtain "his discharge."

The case of *Page* v. *Cole*, 123 Mass., 93, was a suit on a contract, commenced by attachment. "On the same day "personal property of the defendant was attached, and on "the next day the defendant gave a bond with sureties to "*dissolve the attachment*." The case was tried before a judge without a jury, and he found the issues for the plaintiff. On the following day the defendant filed a motion for new trial, which might have been heard on November 6. Counsel for the plaintiff induced the judge to fix November 9 as the day for hearing the motion. The defendant's counsel, having been notified of this fact only an hour before the time fixed for the hearing, came into court and insisted that the argument of the motion should be put over to the next day. This was resisted by counsel for the plaintiff, on the ground that the motion for new trial was frivolous, and the object sought by the delay was to enable

the defendant to go into bankruptcy and thus defeat the suit. The court, however, granted the delay asked.

"On the next day, before the hour appointed, the de- "fendant filed his voluntary petition in bankruptcy, in the "United States District court, and was duly adjudged a "bankrupt, and before the hour fixed for said hearing on "said motion for a new trial, a suggestion of the defend- "ant's bankruptcy was filed in the case, and the usual mo- "tion was made in open court for a continuance of the "cause. The plaintiff's counsel resisted this motion, and "asked for judgment as of November 6. The defendant's "counsel contended that the court could not properly and "legally enter a judgment. No decision was made upon "this motion, but the hearing upon the motion for a new "trial proceeded and was argued by the respective coun- "sel. The judge took these several matters under ad- "visement, and on December 4, 1876, overruled the "motion for a new trial, and ordered judgment for the "plaintiff as of November 6. To this order of judgment "and refusal to continue the case, the defendant alleged "exceptions." The court, speaking by MORTON, J., after quoting the section now under consideration in full, proceeded:

"The object of this provision is not only to protect the "bankrupt, to prevent his being harassed by suits while "the question of his discharge is pending, and to enable "him to plead his discharge in bar of the debt, but also "to enable the assignee to come in and defend the suit. "*Ray* v. *Wight*, 119 Mass., 426, and cases cited. *Na- "tional Bank of Clinton* v. *Taylor*, 120 Mass., 124. In "the case at bar, before judgment was entered, the de- "fendant was duly adjudged a bankrupt, and on the same "day filed in the suit a suggestion of his bankruptcy, and

"made application to the court to have the case stayed to "await the determination of the question of his discharge· "*After this application, the Superior court had no* "*power to proceed further in the suit.* It had no more "power to enter a judgment as of a former day, the "effect of which would be to hold the sureties on the "bond to dissolve the attachment, to render the bankrupt "liable to his sureties for such sum as they might pay "notwithstanding his discharge, and thus practically to "prevent his discharge from operating upon this debt, "than it had to enter a judgment as of the day on which "the order was made. The court cannot take into con- "sideration the fact that the defendant obtained delay by "a frivolous motion for a new trial. The provision of "the bankrupt act is *peremptory* that upon the application "of the bankrupt, *the suit shall be stayed* to await the de- "termination of the court of bankruptcy, on the question "of his discharge. The order of the Superior court, "that judgment be entered as of a former day, was "therefore erroneous."

In the case at bar the Circuit court of Cook county, Illinois, did not even defer enough to the paramount law on the subject as to enter a judgment as of a day prior to the 22d day of April, 1878, the day on which the petition in bankruptcy of plaintiff in error was filed. On the contrary, in the very teeth of the peremptory command of the statute, which said that all proceedings in the case should be stayed, and without any leave being given by or asked of the court of bankruptcy, in which the matter of the bankruptcy of plaintiff in error was pending, the Circuit court entered a judgment against plaintiff in error on May 11, 1878, as of that day.

The case of *Page* v. *Cole*, last above cited, is precisely

in point, and if well decided conclusive of the question in the case at bar. Whatever stage the proceedings may have reached, they must on application of the bankrupt have been stayed, except in the cases provided for. These are, *first*, unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge. This, of course, has no application to the case at bar.

The *second* exception is, that if the amount due the creditor is in dispute, the suit may, "*by leave of the court in bankruptcy*," proceed to judgment, for the purpose of ascertaining the amount due. This exception also has no application to the case at bar. The bankrupt court gave no leave to proceed in this case, nor was it asked to give such leave. Why did not defendants in error apply to the court of bankruptcy for leave to proceed? It was a matter about the formal part of which there was no difficulty, and which would be suggested to any one by the mere reading of the section of the bankrupt act now under consideration. If the leave had been granted, this question would not have arisen here. Express power to enact a bankrupt law is conferred on congress by the constitution of the United States. The law passed in pursuance of that provision is the supreme law on the subject binding on all courts, state and federal. That act says, in terms, that suits against the bankrupt shall, on his application, be stayed, unless the "*court in bankruptcy*" grants leave to proceed. The court which is to grant the leave, is specifically named. No other court has any such power in the premises. As well might a petition in bankruptcy under the late bankrupt act have been filed in the Circuit court of Cook county, Illinois, when exclusive jurisdiction of the subject was conferred on the district courts of the United States, as for application to be made to any other

court to proceed, or for leave to proceed, when exclusive jurisdiction of the subject was conferred on the court in bankruptcy.

It was argued in the courts of Illinois on behalf of defendants in error that the true construction of this portion of the section of the bankrupt act is, "that leave to pro-"ceed is granted so long as there is no order to the con-"trary." That is, that in every case brought or pending against a bankrupt, it will be presumed that leave to proceed has been granted, unless a special restraining order in the particular matter has been obtained from the bankrupt court. This is the position to which defendants in error are driven, and they must sustain it, in order to keep themselves out of the teeth of the bankrupt law. The position is wholly untenable. It reverses the letter and spirit of the law. The law says that suits shall *stop*, unless the court in bankruptcy grants leave that they may be prosecuted. Appellee's position is, that the suits shall *proceed*, unless the court orders them to stop. It is the *fact of bankruptcy* which renders it necessary that the suits should stop, and it is *this fact alone, and not the order of the bankrupt court*, which the law says shall stop them. The reason being as before stated, to prevent a race of diligence between creditors, to convene them all in one court, to prevent the bankrupt from being harassed by a multitude of suits, and to distribute the bankrupt's estate equitably. Under the construction contended for by appellees, if a hundred suits were pending against a bankrupt before as many justices of the peace, he would be obliged to obtain a separate restraining order in each of them. If such was the case, he would have but little time to attend to anything else. No case was cited, and it is believed none can be found sustaining this view, or

anything akin to it; while on the other hand, there is no conflict of authority as to the position that in a case to which the statute applies it, is the duty of the state court to stop when notified of the fact of bankruptcy without any order from the court in bankruptcy to that effect.

When plaintiff in error and his sureties entered into the recognizance which dissolved the attachment, this suit thereupon entirely ceased to be a proceeding *in rem* or attachment, or it did not. One or the other of these propositions must be true. If it continued to be a proceeding *in rem* or attachment, then plaintiff in error had an indisputable statutory right to litigate the ground on which the attachment was issued, and he insisted on this right.

He was, however, denied this right by the Circuit court of Cook county, Illinois, and that question was squarely presented to the Supreme court of Illinois. In order to affirm the judgment that learned court was obliged to hold and did hold that the recognizance utterly dissolved the attachment, changed it from a proceeding *in rem* to one purely *in personam*, and so utterly divested it of all attachment features that plaintiff in error could not litigate the grounds upon which the attachment issued—a right guaranteed him by statute in all attachment proceedings.

The learned Supreme court of Illinois said:

"The recognizance entered into by appellant (plaintiff "in error) and his sureties in this case was in strict con- "formity with the provisions of the statute just cited, and "when so taken and approved by the court and the order "dissolving the attachment was duly entered, the char- "acter of the suit as a proceeding *in rem was thereby* "*completely changed. The suit thereupon became a pro-* "*ceeding in personam as completely as if it had been orig-*

"*inally commenced by an ordinary summons*, and no attach-
"ment had ever been sued out; and the qualified lien
"which appellees (defendants in error) acquired by the
"levy was forever gone. This being so, no possible good
"could have resulted from such an inquiry as to whether
"the attachment was properly or improperly sued out.
"Suppose the plea had been restored, and an issue formed
"thereon had been tried and found in favor of appellent,
"what judgment could the court have rendered thereon?
"Certainly not 'that the writ of attachment be quashed,'
"for that was no longer before the court. The attach-
"ment was already dissolved, and the writ itself was not
"only *functus officio*, but its previous effect and operation
"*were completely annihilated* by the entering into and ap-
"proval of the recognizance, and the order dissolving the
"attachment; and such a judgment, therefore, would
"have been an idle, useless ceremony, without any effect
"whatever upon the suit in question." (*Record, p. 27; Hill* v. *Harding et al.*, 93 Ill., 81.)

The learned Supreme court argued this plain proposition must forcibly, and made the point luminously clear. The learned court was doubtless right in its reasoning and conclusion on this point, and is fully sustained by the decisions of other courts which need not be cited. Defendants in error in the various courts of Illinois, in which this case has been pending have always strenuously insisted that this is the law, and probably will not gainsay it here.

If it be conceded, then, that such is the law, in what position does it put this case and the action of the courts of Illinois herein. In a case standing as to every legal aspect precisely the same as if commenced by summons, with the same legal right to proceed as in any other case

commenced by summons, and no greater right, the Circuit court of Cook county, Illinois, proceeded to final judgment against plaintiff in error, after he was adjudged a bankrupt, in spite of his legal protests properly made, and in the face of the law which unequivocally said the proceedings should stop. If this could be lawfully done in the case at bar, then it could be lawfully done in every suit commenced by summons alone against plaintiff in error or against any other bankrupt, and this command of the law was entirely nugatory. Can any logical reason be given why in a suit standing in every legal aspect as though commenced by summons, the proceedings should not be stayed on the application of the bankrupt and the law obeyed? Such being the legal aspect of the case, could the court to which the application was made legally refuse to obey the law because it fancied some result which it deemed inequitable would follow? If so, then not the law as enacted by congress but the sense of equity of each particular judge before whom an application for stay was made would have governed each case, and bankrupts and those connected with them would have been in a lamentable state of uncertainty as to their rights.

After deciding that the giving of the recognizance divested the case at bar of all features of an attachment suit or proceeding *in rem*, and left it the same as if it had been commenced by summons only, the learned Supreme court of Illinois, with strange inconsistency, in deciding the question presented to this court took precisely the opposite view. The learned court goes on in its opinion and establishes to its satisfaction that an attachment levied more than four months before the bankruptcy of the defendant therein would not be dissolved by such bank-

ruptcy, and that the plaintiff in the suit would have a right to proceed notwithstanding such bankruptcy. It then in effect holds that the liability of the sureties in the recognizance should be made available to the attaching creditors the same as the property would have been if the attachment had not been dissolved, and it affirmed the judgment on the principle that the sureties should be held so liable and for the purpose of holding them so liable.

The learned court says: "But it may be urged that in "the present case the suit has ceased to be an attachment "proceeding. That is true; but the same principle which "forbids a stay of proceedings in attachment cases applies "with equal force to the case at bar. The security for "the judgment which the plaintiffs were seeking to "recover could only have been made available by the "actual rendition of the judgment," etc. (*Record, p. 31; Hill v. Harding et al.*, 93 Ill., 88.)

In order to escape one horn of the dilemma the learned court held that the suit was divested of all attachment features, and in order to escape the other horn, held that the suit was an attachment proceeding to the extent, at least, that it should be governed by the same rules which the learned court thought should govern an attachment proceeding, and that the liability of the sureties should be made to answer the same purpose the attached property would have done had not the attachment been dissolved. The learned court, wholly ignoring the fact that the sureties in the recognizance were not sureties for the debt which plaintiff in error owed defendants in error, but treating the case as if they were such sureties, affirmed the judgment in order to charge them with the payment of the debt, saying, "the bankrupt act *was not*

"*intended* to relieve third parties of just liabilities to the "creditors of the bankrupt, and it should not be so con- "strued as to give it that effect." (*Record, p. 31; Hill* v. *Harding, et al.*, 93 Ill., 88).

It is a matter which should be constantly borne in mind, that the sureties in the recognizance whose liability was sought to be fixed by the decision of the Supreme court of Illinois were never liable for the *debt* which plaintiff in error owed defendants in error, nor were they liable on any contingent demand which defendants in error had against plaintiff in error. The whole of their liability rested upon the *contingency whether there would ever be a demand* by defendants in error against plaintiff in error. This distinction is thoroughly settled, and it is also settled that if the sureties in the recognizance are obliged to pay this debt, plaintiff in error will be liable to them for it, and he will, so far as this debt is concerned, be deprived of the benefit of his discharge in bankruptcy.

Under the older bankrupt laws which contained no provisions for sureties, and persons contingently liable for debts of the bankrupt, proving them against his estate, it was universally held that the surety who after the bankruptcy of the principal, paid the debt for which he was liable, could, notwithstanding the bankruptcy of the principal, recover indemnity from him, because the right of action against the principal and in favor of the surety arose at the time he paid the debt. The following among many cases hold this:

Page v. *Bussell*, 2 Maule & Sel., 551.
Taylor v. *Mills*, Cowper, 525.
Paul v. *Jones*, 1 Durn & East, 599.
Welsh v. *Welsh*, 4 Maule & Sel., 333.
Buel v. *Gordon*, 6 Johnson, 126.

The English bankrupt law of 6 Geo. 4, c. 16, and the United States bankrupt laws of 1841 and 1867, all contained provisions for the proving of claims by sureties *for the debt*, who had not yet paid the same, and for the proof of contingent claims against the estate of the bankrupt. It appears from an inspection of these laws and from the decisions of the courts hereinafter referred to, that the provisions in all these laws with reference to this matter were substantially identical. Decisions under any one of them, therefore, are in point as to all. Under all these laws a distinction has been taken and is well and fully established between a contingent demand and a contingency whether there will ever be a demand. In the latter class of cases, the bankruptcy of the principal does not release him from liability to indemnify his sureties when their liability is established by a contingency which happens after his bankruptcy. The case at bar is one of this class of cases; as a reference to the authorities will clearly demonstrate.

In *Woodward* v. *Herbert*, 24 Maine, 358, a debtor was arrested on mesne process and gave a bond, in common form, to procure his release from arrest; the surety in the bond then filed his petition, under the United States bankrupt act of 1841, and was declared a bankrupt; next, judgment was rendered in the action, and the bond became forfeited by the neglect of the principal to perform the condition thereof. Held, the certificate of the discharge of the surety in bankruptcy furnished no defense to a suit against him on the bond. The court, among other things, said:

"The fifth section of the act (of 1841) to establish a "uniform system of bankruptcy provided that 'all credi- "tors whose debts are not due and payable until a future "day, all annuitants, holders of bottomry and respon-

"dentia bonds, holders of policies of insurance, sure-
"ties, indorsers, bail, and other persons having uncertain
"and contingent demands against such bankrupt,
"shall be permitted to come in and prove such
"debts or claims, under this act, and shall have a right,
"when their debts and claims become absolute, to have
"the same allowed them.' This clause was probably de-
"signed to embrace such debts or claims as the statute of
"6 Geo. 4, c. 16, §§ 51, 53, 56, had authorized to be
"proved under an English commission. The fifty-sixth
"section of that act provided 'that if any bankrupt shall,
"before the issuing of the commission, have contracted
"any debt, payable upon a contingency which shall not
"have happened before the issuing of such commission,
"the person with whom such debt has been contracted
"may, if he think fit, apply to the commissioners to set a
"value upon such debt, and the commissioners are hereby
"required to ascertain the value thereof, and to admit such
"person to prove the amount so ascertained, and to receive
"dividends thereon.'

"It has been decided that by the words 'any debt pay-
"able upon a contingency,' it was intended to include ac-
"tual contingent debts only, and not a mere personal
"obligation, imposing no debt or duty which can be esti-
"mated or valued. *Ex parte Lancaster Canal Company*,
"1 Mont. R., 44; *Lyde* v. *Mann*, 1 Coop. Sel. Ca., 123.
"In the latter case the bankrupt had covenanted to charge
"an annuity upon any property which might come to him
"by his wife's death. He became a bankrupt, and ob-
"tained his certificate. After that his wife died and left
"him an annuity. The decision was that his certificate
"could not be pleaded in bar to the covenant. Lord
"BROUGHAM said, 'it is impossible to treat this as a con-

"tingent debt; it is, in truth, *no debt at all; it is a mere* "*personal obligation to do a certain thing in a most un-* "*certain event.*' He inquired how it was possible to "ascertain the value of it, and remarked, "it is plainly "not at all like a debt payable upon a contingency which "forms the subject of that section.'

"In the act of congress the word demand is used, in- "stead of the word debt. But apparently without any "design to enlarge the class of such contingent claims, for "the word debt is used as a synonym in the same clause, "when speaking of the right to prove 'such debts or "claims under this act.' The same rule of construction "would seem, therefore, to be applicable to the act of con- "gress. Had the plaintiff any actual demand of a con- "tingent character against French at the time when he was "decreed a bankrupt? * *It is necessary to distinguish be-* "*tween a contingent demand and a contingency whether* "*there will ever be a demand.* * The cases of *ex parte* "*Barker*, 9 Ves., 110, and of *Taylor* v. *Young*, 3 B. & "A., 521, although they did not arise unden the statute of "6 Geo. 4, c. 16, shows that the penal sum of a bond, "conditioned to pay or do an act *upon the happening of* "*an uncertain event*, cannot alone be considered such a "contingent debt or demand as is contemplated in the "bankrupt acts."

In *Ellis* v. *Ham*, 28 Me., 385, A became the surety of B on his bond as constable, in March, 1840. During the same month B levied an attachment on certain property, and in October, 1843, judgment was rendered against B for damages occasioned by an official neglect of duty in connection with the attachment. In January, 1843, B was declared a bankrupt under the bankrupt law of 1841. Suit was brought against A, as surety of B in the above

matter in 1844, and in 1845 A paid the amount thus claimed of him, and sued B for indemnity. Held, B was liable, and his bankruptcy was no defense. The court, among other things, said: "The plaintiff (A), when "the petition was filed, had no claim which could be "proved against the defendant (B) in bankruptcy. There "was then no proof that the defendant had not faithfully "discharged all his official duties. There was no contingent "debt due from the defendant to the plaintiff. *There was* "*only a contingency or possibility that such a claim or* "*debt might exist at some future time.* Such a claim could "not be proved or discharged under the act of congress."

In *Hankin* v. *Bennett*, 8 Wels., Hurl. & Gor., 107, the defendant (A), as surety, entered into a bond conditioned that if he should pay to the plaintiff such costs as he should in due course of law be liable to pay, in case the verdict should pass for the then defendant in an action pending which had been brought by one C, in the name of the plaintiff, the bond was to be void. The action mentioned in the condition was a *scire facias* on a judgment obtained by the plaintiff, and which had been assigned to C by T. H., since deceased, of whom the plaintiff was executor. The action was tried at the spring assizes in 1848, when a verdict was found for the defendant. In the following Easter Term, a rule *nisi* for a new trial was obtained. On the 14th of November following a fiat in bankruptcy issued against the defendant (A). In Hiliary Term, 1849, the rule for a new trial was discharged. On May 29th, 1849, the defendant obtained his certificate, and on August 22nd, 1849, the costs were taxed. Held, that at the time the fiat issued, the defendant's (A's) liability, under the bond, was a mere contingent liability, and not a contingent debt within the bankrupt act—6 Geo. 4, c. 16, S. 56—

and the plaintiff's claim for the costs was not barred by the defendant's (A's) certificate. MARTIN, B., in deciding the case, among other things, said: "It was argued, how-"ever, that the liability contained in the condition of the "bond was a debt payable upon a contingency within the "6 Geo. 4, c. 16, S. 56, (the bankrupt act which was in "force at the time when the fiat was issued against the de-"fendant), and that it was provable under the fiat, and the "demand therefore barred. We think, however, that this "liability was not *a debt* at all within the true meaning of "the section. It was a contract to indemnify a nominal "plaintiff, whose name was used by a third person, against "such costs as the plaintiff might become liable to pay to "the defendant in the suit, should the latter obtain judgment "in his favor. It seems to us impossible to consider this *a* "*debt*. It is a mere contingent liability, but not a contin-"gent debt."

In *Hinton* v. *Acraman*, 2 Manning, Granger & Scott, 367, a principal gave bond with sureties conditioned that they would pay such sum or sums as should be recovered in any action or actions which then had been, or should thereafter be commenced for the recovery of a debt alleged to be due from the principal, or that the principal would render himself to the jailer of the court in which such action had been, or might be brought after judgment should be recovered, in such action or actions. After the making of the bond, but before a judgment was recovered for the debt, the principal became bankrupt, and this was pleaded as a defense to a suit on the bond. Held, it was no defense. TINDAL, C. J., in deciding the case, among other things, said: "The original debt in this case is un-"doubtedly barred; but it will not follow, as a necessary "consequence, that a bond given to secure the payment

"of the debt will be also barred.* We must, therefore, "look to the provisions of 6 G. 4, c.1 6, to determine the "point."

The court then referred to the 51st and 56th sections of that act, and, speaking of the last mentioned section, continued: "In the construction of this section, a distinction "has been taken (in the case of *ex parte* Marshall, 1 Mont. "and Ayr., 145, cited, and relied upon by ERSKINE, J., in "*Abbott* v. *Hicks*, 5 N. C., 578, 7 Scott, 733), *between con-* "*tingent liabilities which may never become debts*, and debt "payable on a contingency; and it has been held that the "latter only are provable uuder the commission. The "present case, although in form a case of debt on a bond, "yet the bond being defeasible on performance of the "condition, it is in substance not the case of a contingent "debt, but a contingent liability. *At the time when the fiat* "*issued, it was quite uncertain whether any debt would ever* "*arise npon the bond;* it was at that time a liability which "would not become a debt unless the condition were "broken."

In *Eastman* v. *Hibbard*, 54 New Hampshire, 504, it was held that a discharge under the bankrupt act of 1867 was no bar to a suit against a surety on a bond executed before the bankruptcy to secure the plaintiff for such damages as might be occasioned him by an injunction staying the collection of an execution, when the equity proceeding in which the injunction was issued was not determined till after the discharge. In the course of the decision the court said: "Section 19 of the act of 1867 is "to the same general purpose as section 5 of the bankrupt "act of 1841 and the English act of 6 Geo. 4, c. 16, "namely, to provide for the proof of contingent debts and

"demands. Cases decided under the provisions of those "acts may therefore be considered as in point."

To a similar effect also see:

McMullin v. *Bank of Penn Township*, 2 Pa. St., 343.
Coke v. *Lewis*, 8 Pa. St., 493.
Wells v. *Mace*, 17 Vermont, 503.
Emery v. *Clarke*, 2 J. SCOTT (N. S.), 582.
Comfort v. *Eisenbeis*, 11 Pa. St., 13.
Haddens v. *Chambers*, 2 Dallas (Pa.), 236.

Plaintiff in error's petition in bankruptcy was filed the 22d day of April, 1878. He was adjudged a bankrupt on the 1st day of May, 1878. On the 11th day of May, 1878, this judgment was rendered against him. Plaintiff in error's bankruptcy discharged him from claims which existed at the time when his petition was filed, but the judgment in this case, which is an unconditional one and rendered after his adjudication in bankruptcy, is a claim on which execution may issue and be levied on any property plaintiff in error may have, notwithstanding his discharge in bankruptcy.

For this reason, and also clearly because plaintiff in error will be obliged to indemnify his sureties if they have to pay this claim, he will notwithstanding his discharge in bankruptcy, be liable for the amount of this bill for attorney's fees of defendants in error if the action of the courts of Illinois in this case is sustained. And this although the undisputed intent and plain letter of the bankrupt law declares that his bankruptcy shall free him from such claims. Surely the language and spirit of the law which said that the proceedings in this case must stop upon motion being made for that purpose should not be

set at naught to accomplish a result so directly at war with principal end sought by the bankrupt act.

In *Page* v. *Cole*, 123 Mass., 93, the Supreme court of Massachusetts, speaking of the judgment entered by the court below in a case and under circumstances similar to those in the case at bar, said: "It had no more power to "enter a judgment as of a former day the effect of which "would be to hold the sureties on the bond to dissolve "the attachment to render the bankrupt liable to his sure- "ties for such sum as they might pay notwithstanding his "discharge, *and thus practically to prevent his discharge* "*from operating on his debt*, than it had to enter a judg- "ment as of the day on which the order was made," etc. The logic of this position seems irresistible, but it has been lost sight of or disregarded by the courts which have heretofore passed on the case at bar, which, irrespective of other considerations have seemed determined to so shape the case as to force the sureties in the recognizance pay the debt of plaintiff in error to defendants in error. It is submitted that those courts have in furtherance of this object not only violated the letter and spirit of the late bankrupt law, but have entirely ignored a principle universally recognized with reference to the liability of sureties.

It is a general rule, without exception, that sureties are favorites of the law, have a right to stand upon the strict terms of their obligations, and that no intendments will be made against them. In *Law* v. *the East India Company*, 4 Vessey, 824, the court said: "Where any act has been "done by the obligee that may injure the surety, the court "is very glad to lay hold of it in favor of the surety." In *Lang* v. *Pike*, 27 Ohio St., 498, the court said: "No "principle is more firmly settled in this state than this:

"that sureties may stand *on the very terms of a statutory* "*bond or undertaking*. So clearly has this doctrine been "announced and acted upon that it may be regarded *as* "*entering into the condition of such an undertaking*, that "it will not be extended by the courts beyond the neces- "sary import of the words used." In *Kingsbury* v. *West-fall*, 61 New York, 356, the court said: "It is now too "well settled to admit of doubt that a guarantor, like a "surety, is bound only by the strict letter or precise terms "of the contract of his principal, whose performance of it "he has guaranteed; that he is in this respect a favorite "of the law, and that a claim against him is *strictissimi* "*juris*."

This rule has been many times announced and acted upon by the learned Supreme Court of Illinois. In *Stull* v. *Hance*, 62 Ill., 55 WALKER, J., said: "The contract "of a surety is strictly construed, and his liability is never "extended beyond the terms of his agreement, or at least "its manifest purport. *In case of doubt, the doubt is* "*generally, if not universally, solved in his favor*." In *The People* v. *Tompkins*, 74 Ill., 486, SCHOLFIELD, J., said: "No principle of law is better settled than that "the contract of a surety is to be construed strictly, and "his liability cannot be extended by implication beyond "the terms of his obligation. As observed by STORY, J., "in *Miller* v. *Stewart et al.*, 9 Wheaton, 680: 'To "the extent and in the manner and under the circum- "stances pointed out in his obligation he is bound, and no "further.' *Reynolds* v. *Hall et al.*, 1 Scam., 35; *People*, "*etc.*, v. *Moon*, 3 id., 123; *Governor, etc.*, v. *Ridgway*, 12 "Ill., 14; *C. & A. R. Co.* v. *Higgins et al.*, 58 id., 128; "*Smith* v. *Peoria County*, 39 id., 425."

It has often been held, and is unquestioned law, that a surety is under no moral obligation to pay the debt of his principal:

Winston v. *Fenwick*, 4 Stew. & Port. (Ala.), 269.
Harrison v. *Field*, 2 Washington (Va.), 136.
Pickersgill v. *Lahens*, 15 Wallace, 140.
Pecker v. *Julius*, 2 Browne (Pa.), 31.
VanDerveer v. *Wright*, 6 Barb. (N. Y.), 547.

If the surety in a joint obligation dies, the remedy against his estate is gone at law, and equity will not, in the absence of fraud or mistake, charge it. If all the joint obligors are principles, and participate in the consideration, a court of equity will enforce the obligation against the estate of the deceased obligor, because the reasonable presumption is, that the parties intended the obligation to be joint and several, but through fraud or mistake it was made joint only. But, as said by DAVIS, J., in *Pickersgill* v. *Lahens*, 15 Wallace, 140: "This presumption is never "indulged in the case of a mere surety, whose duty is "measured alone by the legal force of the bond, *and who* "*is under no moral obligation whatever* to pay the obligee "independent of his covenant, and consequently there is "nothing on which to found an equity for the interposition "of a court of chancery." Holding the same thing, see also

Risley v. *Brown*, 67 New York, 160.
Weaver v. *Shyrock*, 6 Serg. & Rawle (Pa.), 262.
Rawstone v. *Parr*, 3 Russell, 539.
Kennedy v. *Carpenter*, 2 Wharton (Pa.), 344.

Other v. *Iveson*, 3 Drewry, 177.
Towne v. *Ammidown*, 20 Pick., 535.
Wood v. *Fish*, 63 New York, 245.

One of the reasons given in some of the case last cited, why the estate of the deceased surety should not be charged, is, that he may have had the obligation made joint only, having in view the fact that he might die, and if he did, his estate would not liable.

So in the case at bar, the sureties who entered into the recognizance, may have been willing to enter into the recognizance for the payment of any judgment that might be recovered, which had the effect of wholly dissolving the attachment and freeing the case thenceforth from any of the ordinary incidents of an attachment, when they would have been unwilling to enter into a bond for the forthcoming of the property, which would have left the attachment proceedings intact. They may, when entering into the recognizance, have contemplated the bankruptcy of plaintiff in error as a contingency likely to happen, and have expected that they would be thereby discharged from liability.

No court has announced in broader terms, nor enforced more consistently the foregoing principles with reference to the liability of sureties than this honorable court. There is no conflict of authority as to the principle that no intendments will be made against mere sureties such as those who are sought to be charged in this case. The debt due defendants in error was no more sacred than the debts of the other creditors of plaintiff in error. There was and is no equitable reason why it should be paid in preference to any other debt owed by plaintiff in error. If the strict letter of the law binds the sureties to

pay this debt, they will be holden, but not otherwise. They were never liable for this debt at all, but only liable in case of a contingency, which could not happen if the law was obeyed. Upon the general and well settled rules with reference to the liability of sureties, no judgment should have been entered in this case for the purpose of charging the sureties in the recognizance. But express authority on the very point is not wanting.

In *Carpenter* v. *Turrell*, 100 Mass., 450, an attachment was levied on property of the defendants which was dissolved by a bond given by the defendants and sureties. More than four months afterwards, the defendants "filed "their petition in bankruptcy, and suggested on the record "the pendency of the bankruptcy proceedings." At the trial of the case before a judge without a jury, "the plain- "tiffs requested the judge to find for them, to the end that "a special judgment for the plaintiffs might be entered, "and the plaintiffs thereby enabled to avail themselves of "the bond given to dissolve the attachment." The court refused to do this, and held that the bankruptcy proceedings were a bar to the further prosecution of the suit. In this he was sustained by the Supreme court, which, speak- "ing through WELLS, J., said: "The plaintiffs contend that "the bond is a mere substitute for the attachment, and "therefore, that it should stand in all respects as its pre- "cise equivalent. But such is not the purport of the bond, "nor the intention of the statute which authorizes it to be "given. *It does not merely restore the possession of the "property to the debtor, subject to the attachment; it dis- "solves the attachment utterly. It is not given for the "property itself, nor as security for its value; but for "the payment absolutely of the judgment when recovered "in the suit, whatever may be its amount.* It is, in many

"respects, a higher and better security for the creditor "than the attachment. It is not liable to be discharged by "the insolvency or death of the debtor, nor by any facts "which might dissolve the attachment without defeating "the suit. This is shown by the cases cited upon the "brief for the plaintiffs. The bond, although a *substitute* "*for the attachment, is not its equivalent, and has not its* "*incidents*. The provision of the bankrupt act, which "preserves liens and attachments, cannot, therefore, have "any application to it. The plaintiffs also rely upon the "provision of the bankrupt act which continues the liability "of sureties, and other parties collaterally bound, notwith- "standing the discharge of their principal. But we under- "stand that provision to apply to persons who *are liable* "*for the debt of the bankrupt, which existed before, and is* "*discharged by the proceedings in bankruptcy*. This bond "was not such a debt. It does not become of the nature "of a debt until the contingency arises upon which it is to "be made operative; to wit, *a judgment valid against the* "*principal*, and which he is bound to pay, but which "remains for thirty days undaid. The obligation of the "principal himself is merely collateral to the suit. Until "judgment, the bond bears a relation to the actual debt "not unlike that of a replevin or bail bond, recognizance "with sureties *upon appeal*. They are incident to the "legal proceedings, and follow the result of the suit. If "the plaintiff become non-suit, the debt would not be dis- "charged, but the bond would be. So, when judgment is "rendered for the defendant upon the plea of a discharge "in bankruptcy, the bond is discharged, not by the pro- "ceedings in bankruptcy, but by the determination of the "contingency upon which the obligation of the bond is "made to depend."

This case is, in every material respect, precisely like the one at bar, and if well decided, is conclusive of the entire question presented to this court for determination. It has been followed, approved and amplified by several subsequent decisions of the same court, and is the settled law of Massachusetts, as appears from the following cases:

Hamilton v. *Bryant*, 114 Mass., 543.
Braley v. *Boomer*, 116 Mass., 527.
Page v. *Cole*, 123 Mass., 93.

In *Payne* v. *Able*, 7 Bush. (Ky.), 344, three suits were instituted against Able in which attachments were levied on his property, in two of which bonds were given, which had the effect of dissolving the attachments, as in the case at bar, and in the other a forthcoming bond was given. Able afterwards went into bankruptcy and was discharged, and pleaded his discharge in the cases. The plaintiffs asked for a rule on the sureties in the bonds aforesaid, to pay them the amount of the debts, to secure which the attachments had been levied. This the court refused to do, and the Supreme court said concerning it: "We are also of the "opinion that the court properly refused the rule against "the sureties on the attachment bonds. The act of con- "gress, it is true, provides that 'no discharge granted un- "der this act shall release, discharge or affect any person "liable for the same debts, for or with the bankrupt, either "as partner, joint-contractor, indorser, security or other- "wise.' But the sureties on the attachment bonds were "*never liable for the debts*, and did not contract to pay the "same, or any portion of them. In two of the bonds they "agreed and understood that the defendant, Able, should "*perform the judgments of the court;* and in the other, "that the attached property, or its value, should 'be forth- "coming, and subject to the order of the court for the sat-

"isfaction of such judgment.' No judgments were, or "could have been rendered against Able, and hence *the "contingencies upon which they were* to become liable as "sureties, have not arisen, and cannot now arise."

In *Martin* v. *Kilbourn*, 12 Heiskell (Tenn.), 331, a judgment was rendered by a justice of the peace on a note, and the defendant appealed, and gave an appeal bond, conditioned that he would "prosecute his appeal with effect, "otherwise comply with and perform the judgment of the "court." In the Circuit court the defendant pleaded a discharge in bankruptcy, upon which judgment was rendered in his favor. Held that the surety on the appeal bond was discharged, and no judgment could be rendered against him. The court said: "We know of no principle "on which judgment could be rendered against the surety, "unless there is something in the bankrupt law which con- "trols the case. It is provided by the bankrupt law that "no discharge of the bankrupt shall release, discharge or "affect any person liable for the same debt, either as part- "ner, joint-contractor, endorser, security or otherwise. "Martin never was *liable on the debt* with Allen, in any "character. The appeal vacated the judgment, and Mar- "tin was only liable *in the event judgment should be ren- "dered* against Allen in the Circuit court. This was not "done. On the contrary, Allen prosecuted his appeal with "effect, and Martin was no longer liable on his bond. "*Able* v. *Payne*, 7 Bush, 344."

In *Odell* v. *Wootten*, 38 Georgia, 224, the principal in an appeal bond went into bankruptcy after the appeal was taken, and was discharged, and the question was whether this did not discharge the surety in the appeal bond. The court held that as no judgment was rendered against the principal, the surety was not bound, and proceeded:

"But it is insisted by counsel for plaintiff in error, that "the act of congress, known as the bankrupt act, Sec. "33, is the paramount law on this subject, and that it "enacts that the discharge of the principal, as a bankrupt, "shall not discharge the security. A careful perusal of "the act will show that this applies only to a surety who "contracted to become liable *for the payment of the debt*, "and not *for the payment of the judgment* to be entered "in a particular action then pending. Its language is "'no discharge granted under this act shall release, dis- "charge, or affect any person liable for the same debt, for "or with the bankrupt, either as partner, joint contractor, "indorser, security, or otherwise.' This clearly contem- "plates a case where the security contracts to become "liable with the principal *for the payment of the debt*. "This same act (Sec. 21), which under the constitution "of the United States is, we admit, the paramount law on "this subject, declares that no creditor, whose debt is "provable under this act, shall be allowed to prosecute "any suit at law or in equity, to final judgment against "the debtor, after he is adjudged a bankrupt, until the "question of his discharge has been determined. Again, "it is declared in Sec. 54, that the discharge duly granted "under this act shall, with the exceptions aforesaid (which "do not apply in this case), release the bankrupt from all "debts, claims, liabilities and demands which were or "might have been proved against his estate in bankruptcy. "Wooten's contract, when he signed the appeal bond, was "*to pay the judgment* that might be entered in that case. "His principal was afterwards adjudged a bankrupt, and "discharged as such. And the paramount law says, *as "the claim was provable in bankruptcy, that the principal "shall be absolutely released from the debt*, and that no

"judgment shall ever be entered in the case. Upon this "state of facts we hold that Wooten, the security on the "appeal, has complied with his contract, and his liability "ceases."

All the four cases from which quotations have last been made concur in the view, that where the liability of the surety is *not for the debt*, but *for a judgment which may or may not thereafter be rendered*, he is discharged by the bankruptcy of the principal. The principle involved in the case of an appeal bond, and in the case of a bond given to dissolve an attachment, is precisely the same. The liability in both cases is for a judgment which may or may not thereafter be rendered against the principal. In *Carpenter* v. *Turrell*, 100 Mass., 450, the court, in terms, likens the bond given to dissolve the attachment to an appeal bond; and in *Martin* v. *Kilbourn*, 12 Heiskel, (Tenn.), 331, which was a case on an appeal bond, *Payne* v. *Able*, 7 Bush, 344, which was a case on a bond to dissolve an attachment, is cited as an authority in point.

The principle upon which all these cases proceed has in a late case been fully and in terms approved by this honorable court. In *Wolf* v. *Stix*, 9 Otto (99 U. S.) 1, the question under consideration was the liability of sureties on a bond where the principal, in legal effect, purchased the interest of certain creditors in goods which had been attached, and with his sureties agreed to pay such creditors $10,000, if upon the trial of the suit in which the attachment issued, it should appear that they had any interest to sell. The opinion was delivered by Mr. Chief Justice Waite, who, among other things, said:

"Sect. 5118, Rev. Stat., provides that 'no discharge "shall release, dischage, or affect any person liable for "the same debt for or with the bankrupt either as part- "ner, joint contractor, indorser, surety or otherwise.' "The cases are numerous in which it has been held, and "we think correctly, that if one is bound as surety for "another to pay any judgment that may be rendered in a "specified action, if the judgment is defeated by the bank- "ruptcy of the person for whom the obligation is as- "sumed, the surety will be released. The obvious reason "is that the event has not happened on which the liability "of the surety was made to depend. Of this class of ob- "ligations are the ordinary *bonds in attachment suits to dis- "solve an attachment*, *appeal bonds*, and the like."

It should all the time be borne in mind, that the sureties in the recognizance given to dissolve the attachment in this case, never became and are not liable for the *debt* plaintiff in error owed defendants in error. They became liable for a *judgment* which might or might not thereafter be rendered against plaintiff in error. They may have been willing to become thus liable, and yet have been unwilling to become liable for the debt, or liable in any other way. They have a right to stand upon the terms of their obligation. It will not do to say that they would have been liable if they had signed a bond for the forthcoming of the property, or that if they had given no bond the property would have paid the debt, and therefore they shall pay it. Yet these are the only grounds upon which any argument can be based to sustain the entering of a judgment against plaintiff in error for the purpose of charging them. The statement of such a proposition is its refutation. A mere surety is not liable for what the opposite party in a case, or a court, may think he ought

to have agreed to do. He is only liable for what he actually did agree to do.

The case of *Peck* v. *Jenness*, 7 Howard (U. S)., 612, was much relied upon and extensively quoted in the courts of Illinois on behalf of defendants in error. This was a case arising under the bankrupt act of A. D. 1841, and except the simple fact that an attachment had been levied in the case, it had nothing in it, even remotely like the case at bar. The principal question in that case, was whether an *attachment* was a *lien* within the words of that act which preserved "liens, mortgages or other se- "curities on property real or personal, which may be "valid by the laws of the states respectively," etc., attachments not being, it seems, specifically mention in the act. The court held it was. No question of the dissolution of an attachment by bond or otherwise, arose or was considered. That act, so far from providing that suits against the bankrupt should stop upon the fact of bankruptcy occuring, as the act of A. D. 1867 provided, on the contrary, expressly provided that "all suits in law and equity "then pending, in which such bankrupt is a party, may be "prosecuted and defended by such assignee to its final "conclusion in the same way, and with the same effect as "they might have been by such bankrupt." What Judge Grier said about the district court of the United States, and the state court had reference to this condition of facts, and he, in terms, says, that under that law the bankruptcy court had no right to interfere with proceedings in the state courts, because the law gave it none, but on the contrary, expressly provided that the suits against the bankrupt in other courts should proceed. This case has no tendency to support the views of defendants in error.

Defendants in error also relied greatly in the courts of Illinois on the case of *Zoller* v. *Janvrin*, 49 New Hampshire, 114. The question *decided* in that case, was whether the defendant should be allowed to file a plea *puis darrein continuance*. Judge FOSTER, who delivered the opinion, indulged in some speculations as to what ought to be the liability of a surety on a bond given under the law of that state to dissolve an attachment. He commenced by saying that "it does not seem necessary at "this time to consider the question," etc., and concluded: "But, however this may be—and the foregoing remarks "are to be regarded as suggestions merely, since we do "not feel called upon to pass definitely upon the questions "thus involved." All that was said on the subject was dictum only, and by the Judge himself stated to be so. When a court is composed of several judges, a dictum contained in an opinion delivered bp one of them is not the dictum of the court, but of the single judge who delivers the opinion. The value of the words of a single judge when speaking of a subject not before him, which has not been argued, and concerning which he feels no responsibility so far as the case he is deciding is concerned, is too well understood to require comment.

The case of *Holyoke* v. *Adams*, 59 New York, 233, *Id.*, 13 Bankruptcy Register, 413, was also relied upon by defendants in error. The question *decided* in that case was one of pleading, and was whether the defendant should be allowed to file a pleading in the nature of a plea *puis darrein continuance*. The judge who delivered the opinion of the court below (Supreme court), said that in his opinion the bond given to dissolve an attachment was a continuation of the attachment proceeding and a substitute for the levy made thereunder, and he did not

agree with what was decided in *Carpenter* v. *Turrell*, 100 Mass., 450.

The case was taken to the court of appeals of New York, and that court held that as the granting or refusing leave to file a plea *puis darrein continuance*, setting up the bankruptcy of the defendant, was a matter of discretion, and granting the *leave would deprive the plaintiffs of the benefit of the bond to dissolve the attachment;* the leave would not be granted. Judge FOLGER, who delivered the opinion of the court, after stating the views of the judge of the court below, as above given, proceeded: "Without any consideration of the question on which the "courts below and the court in Massachusetts, in *Car-* "*penter* v. *Turrell* (100 Mass., 450), are at variance, *it is* "*quite certain* that the effect of this defense, if interposed, "will be to deprive the plaintiffs of a fair and honest ad- "vantage they had obtained by their diligent pursuit of "legal means and remedies."

It thus appears, and from the whole case is clear, that it was the opinion of the court of appeals that the decision in *Carpenter* v. *Turrell* was right, and that if the defense of the bankruptcy of the defendant was allowed to be made, the sureties in the bond given to dissolve the attachment would be discharged. On account of the state of the pleadings the court could and did prevent this by the exercise of a legal discretion, and the reason given for this exercise of discretion was that the sureties would otherwise be discharged. This decision in the Court of appeals is a disapproval of the argument of the Supreme court in the case, and is a direct decision that the position assumed by plaintiff in error here is correct, and that the action of the courts of Illinois in the case at bar was erroneous.

The case upon which the greatest reliance was placed by defendants in error, was that of *In re Albrecht*, 17 Bankruptcy Register, 287. In that case, "it appeared "from the pleadings that on September 6th, 1876, Seeley "commenced a suit against Albrecht in the Circuit court, "for the county of Ionia, and procured a writ of garnish- "ment against the First National Bank of that place, a "debtor of Albrecht; that shortly thereafter, the defen- "dant obtained the release of the garnishee, by giving a "bond under the statute whereupon he drew the money "from the bank, and placed it in the hands of one Rich, "to indemnify his sureties. This suit had ever since re- "mained in *statu quo*. Proceedings in bankruptcy were "commenced on the 26th of September, 1877, and the "assignee filed this petition for the purpose of staying "proceedings in the state court, *and of obtaining the* "*money in the hands of Rich as part of the assets of the* "*estate*."

These are the facts as stated in the report. It will be perceived that two objects were sought by the petition of the assignee, and they were: *first*, staying the proceedings in the state court; and, *second*, obtaining the money in the hands of Rich, and held by him as indemnity for the sure- ties. This petition was denied without prejudice. The concluding portion of the opinion was as follows: "It may "be the assignee is entitled to a *temporary stay of pro-* "*ceedings* until the question of discharge is determined, to "enable him to appear, plead the discharge and raise the "question in the state court; *but as the petittion was not* "*framed upon that basis, and the suggestion was not made* "*upon the argument*, it is unnecessary to pass upon this "question. The petition must be denied *without preju-* "*dice*."

It thus appears that the court in that case did not think the assignee was entitled to the money in the hands of Rich, but he did think that there should be "a temporary "stay of prceedings until the question of a discharge" was determined, so that the same might be pleaded in the state court, and he dismissed the petition without prejudice, with the evident intention of leaving the way open for a petition for a stay alone.

"A temporary stay of proceedings until the question of "a discharge" to plaintiff in error should be determined, was all that was asked by him in the Circuit court. The opinion of the court in the case *In re Albrecht* was that this should have been granted.

The case *In re Albrecht* was decided by BROWN, J., the single judge of the District court of the United States for the Eastern District of Michigan. It should be observed that this was the court upon which the bankrupt law conferred the power to grant leave to proceed in cases against the bankrupt.

Judge Brown expressed the opinion in that case that the sureties on the bond given to dissolve the attachment, should be held. He based his opinion on *Zollar* v. *Janvrin*, which, as shown, has nothing in it to that effect, except dictum; on *Peck* v. *Jenness*, which, as shown, decides nothing bearing on the question; and on *Holyoke* v. *Adams*, which, as shown, holds the contrary doctrine.

The reason principally relied on for this opinion of Judge Brown, as to what the law ought to be in this regard, and for the *dicta* of the other judges above noticed to the same effect, is that the obligation of the sureties to pay any judgment which might be recovered in the action, was an agreement to do "exactly what the property

seized" would have done if no bond had been given. This is not true as a matter of fact, and any reasoning founded on that assumption must necessarily be erroneous. The bond given to dissolve an attachment provides for the payment of the entire judgment which may be rendered. The property levied on might not be sufficient to pay one-half the judgment. A bond for the forthcoming of the property would have the same incidents as the property itself. A recovery on it, in case of breach, would be limited to the value of the property, no matter what might be the amount of the judgment.

Under the laws of the State of Illinois above quoted, when an attachment is levied, the defendant may pursue any one of three courses. He may do nothing, and allow the sheriff to retain possession of the property. He may give a bond for the forthcoming of the property, and thereby obtain possession of it. If he does this, the attachment features of the case continue, the grounds upon which the attachment was issued may be contested, the bond stands in the place of the property, and in case of a breach, the value of the property is the measure of damages. The third course to pursue is, to give a bond or enter into recognizance for the payment of any judgment and costs that may be obtained in the case. If this course is pursued, the case is thereafter freed from all attachment features. The grounds upon which the attachment was issued, cannot be litigated, and the measure of damages, in case of a breach of the contract, is the full amount of the judgment and costs, irrespective of the value of the property.

The obligations of a bond for the forthcoming of the property, and of a recognizance for the payment of the judgment, are essentially different. This difference is the

result of statutory law. If, as thought by the judge in the case of *In re Albrecht*, and by the judge who delivered the dictum in *Zoller* v. *Jauvrin*, the obligation of a recognizance to dissolve an attachment should be to do precisely what the attached property would have done, that is an argument to address to the legislature, but the court cannot construe the obligation of the sureties to be that which it thinks the legislature should have, but has not, made it. It is idle to say that a recognizance given to dissolve an attachment binds the sureties to do precisely what the attached property would have done.

The legislature might have enacted no law concerning attachments, or it might have enacted that no attachments should issue. Having enacted that attachments might issue, it might have enacted that they should not be dissolved, that they might be dissolved on the defendant's recognizance alone, or in any other way. All these things were within the legislative discretion, and it provided two ways for dissolving attachments of either one, of which a defendant might avail himself. One of these ways was a substitute for the attached property and had its incidents. The other was not a substitute for the attached property, and had not its incidents. Plaintiff in error and his sureties chose to avail themselves of the latter means. They may have been, and their acts showed they were, unwilling to become bound in an obligation which was a substitute for the attached property. As they refused to enter into such an obligation, no reason is perceived for holding them bound as though they had done so. That would be to make a contract for them, and not determine their liability by that which they had made.

Suppose that one Smith, being a creditor of plaintiff in error, had levied an attachment on his property; that two

days afterwards this attachment of defendants in error had been levied; that when it lacked but one day of four months after the levy of the attachment of defendants in error, plaintiff in error had become a bankrupt, and that in both cases forthcoming bonds had been given for the property. Under these circumstances defendants in error would have been dilligent. It would have been a great hardship on them to lose their money. They would have had as good an equitable right to have their attachment sustained as Smith had. All the equitable reasons given by judges for disregarding the bankrupt law in this particular would exist. Yet, for all this, Smith's attachment would not have been affected by the bankrupt law, while the attachment of defendants in error would have been dissolved. This would have been so, for the reason alone that the law made it so. In such case, could it have been reasonably contended that the attachment of defendants in error should be sustained, because of the hardship on them, or for any other reason? Yet they would have precisely the same reason to make that claim as to contend that the plain and peremptory command of the statute should be overridden in the case at bar.

The case of *Denny* v. *Merrifield*, 128 Mass., 228, decided by the Supreme court of Massachusetts, bears directly on the main question in this case and is a very clear exposition of the duty of courts to *enforce* the law as the legislature has made it, and not to *make* the law as they think the legislature should have made it. The case was this:

"The debt sued on was a valid debt due from the de-
"fendant to the plaintiff. The action was commenced on
"January 31st, 1878, by an attachment of the defendant's
"property which was sufficient, and the attaching officer

"had in his hands, when this action was entered, money "enough to pay the plaintiff's claim in full. On Febru- "ary 21st, 1878, the defendant filed his petition in bank- "ruptcy in the District court of the United States, for the "district of Massachusetts, but no hearing was ever had "on the petition, nor was the defendant ever adjudged a "bankrupt, nor an assignee of his estate chosen. At "the time of filing his petition in bankruptcy, the de- "fendant also filed, under the U. S. St. of June 22d, "1874, § 17, an offer of composition" which was ac- cepted by the requisite majority of his creditors, and fully carried out by the defendant, who tendered the plaintiff his share of the composition, which the plaintiff refused to accept.

"On April 16th, 1878, the defendant filed with the clerk "of the court a bond, with sureties approved by the plain- "tiff's attorney, to dissolve the attachment, the condition "of which was that the defendant should, within thirty "days after the final judgment in such action, pay to the "plaintiff the amount, if any, which he should recover, "and the sureties should also, within thirty days after the "entry of any special judgment in such action, pay to the "plaintiff the sum, if any, for which such judgment should "be entered; and the officer surrendered the property "attached to the defendant. * The plaintiff contended "that he was entitled to a judgment against the defendant, "or a judgment against the property attached, or a special "judgment, or such a judgment as would entitle him to "proceed against the sureties on the bond. But the judge "ordered judgment for the defendant."

Mr. Chief Justice GRAY, in delivering the opinion of the court on this state of facts, said:

"The U. S. St. of June 22d, 1874, § 17, allows a cred-

"itor holding collateral security for his debt to share in "the proceedings of composition only to excess of the "debt above the security, or upon surrendering the secu- "rity for the benefit of the estate; and makes the compo- "sition binding upon all debts, whether secured or unse- "cured, which are duly described in the statement of the "debtor, and are of such a nature that they would be "barred by a certificate of discharge in bankruptcy. "*Mudge* v. *Wilmot*, 124 Mass., 493; *Leggett* v. *Barton*, "11 Vroom., 83. The composition, followed by pay- "ment or tender of the sums due according to it, there- "fore discharged the defendant from personal liability to "the plaintiff, and the plaintiff is not entitled to a general "judgment.

"As no assignment in bankruptcy was ever made, the "proceedings did not discharge the plaintiff's attachment, "and would not have prevented the plaintiff, if the prop- "erty attached had remained subject to the lien created "by the attachment, from taking special judgment against "the property, for the purpose of giving effect to that "lien. *Ray* v. *Wight*, 119 Mass., 426; *Sage* v. *Heller*, "124 Mass., 213; *Alsop* v. *White*, 45 Com., 499

"But the attachment having been dissolved, and the "property surrendered to the defendant, upon giving bond "for the payment of any judgment recovered in the ac- "tion, the property attached is no longer bound by the at- "tachment, and consequently no special judgment against "the property can be entered.

"The remaining question is, whether a special judgment "can be given for the plaintiff, *for the purpose of charging* "*the sureties on that bond.* If the bond had been in the "ordinary form of a bond to dissolve an attachment such "as was in use in this commonwealth before the passage

"of the St. of 1875, *c.* 68, no special judgment could have "been rendered. The plaintiff's rights, therefore, de- "pend upon the construction of this statute. *Barn-* "*stable Savings Bank* v. *Higgins*, 124 Mass., 115, and "cases cited.

"Proceedings for a composition under the act of con- "gress of 1874 may be had at any time after the filing of "a petition in bankruptcy, 'whether an adjudication in "bankruptcy shall have been had or not'; and, as already "stated, do not, unless there has been an assignment in "bankruptcy, dissolve attachments, though made within "four months before the filing of the petition. The St. "of 1875, *c* 68, passed nine months later, authorized the "entry of a special judgment for the purpose of charging "the sureties on a bond given to dissolve an attachment, "only in cases in which both the defendant 'has already "been or afterwards is adjudged a bankrupt'; and the "attachment is 'not made within four months next pre- "ceding the commencement of proceedings in bankruptcy.' "This statute cannot, consistently with its explicit pro- "visions, be construed to include cases like that before us "in which there has been no adjudication of bankruptcy, "nor assignment in bankruptcy, nor attachment made "more than four monhts before the filing of the petition.

"If we were sitting *as legislators*, we might yield to the "suggestion that the *reasons are no less strong* for allow- "ing such a special judgment to be entered in every case "in which proceedings in bankruptcy are had for the "distribution of a debtor's property among his creditors, "and for his discharge from his debts by way of compo- "sition, than in a case in which he is adjudged a bank- "rupt, and the subsequent dealings are in the ordinary "form; and in a case in which the attachment, though

"made within four months before the commencement of "proceedings in bankruptcy, fails to be dissolved, because "no assignment in bankruptcy is made, than in one in "which, notwithstanding such an assignment, the attach- "ment remains in force because made more than four "months before the commencement of such proceedings. "But *sitting as judges*, we cannot extend the statute by "construction to cases which, though they may appear to "be *within its reason*, do not satisfy the conditions clearly "prescribed and defined by its language. *Jacob* v. *United* "*States*, 1 Brock, 520; *Denn* v. *Reid*, 10 Pet., 524, 527; "*Putnam* v. *Longley*, 11 Pick., 487, 490."

All arguments based on the hardship which this case works on defendants in error are valueless. It is a hardship upon any creditor to lose the money justly due him, yet thousands of creditors have lost their debts through the instrumentality of the bankrupt law. These arguments should be addressed to the law-making power, and not to the courts, which simply administer statutory law as it is made. It is no harder for defendants in error to lose their debt, than for any other creditor of plaintiff in error to lose his. It will be no harder for defendants in error to lose the amount of their debt than it will be for the sureties to lose it. Courts do not decide cases such as this to equalize hardships, but base their decisions on the law as they find it.

If this case had been commenced by summons only, and no attachment had been issued, and the sureties in the recognizance had entered into a voluntary bond of the same obligation as the recognizance, could it be successfully contended that judgment should have been entered in the case simply for the purpose of charging them? Yet

that case is in no legal aspect different from this. They were bound by the terms of their obligation alone, and the cause which induced them to assume it was wholly immaterial. The only proper inquiry, so far as they are concerned, is, what is the obligation?

Whatever may have been the liability of the sureties, the application for a stay having been properly made, and there being no exigency demanding hasty action, nor any immediate action on the part of the Circuit court, the law should have been obeyed, and a stay for a reasonable time granted. This was the opinion of Judge Brown, in the case *In re Albrecht*, although he thought the sureties ought to be held. This was also the decision of the Supreme court of Massachusetts, although it held that the sureties were discharged. This was also the opinion of Judge Benedict, in the case *In re Metcalf*, and such was the decision of the Supreme courts of Iowa and South Carolina, as already shown. Above all, it was the plain and clear letter and spirit of the law.

As already demonstrated this case, an ordinary action of assumpsit, stood at the time the application for a stay was made and refused precisely as if it had been commenced by summons only. The law was just as imperative that, on application, all proceedings in it should be stayed as in any other case commenced by summons. The question in this case is, whether the paramount and clearly expressed law on the subject should have been followed and obeyed, or whether in every case commenced by summons, the court to which application for a stay was made might entirely ignore the law, for the purpose of dministering some alleged equity which it thought to exist; and thus not only constitute itself a legislature to en-

act the law to suit its tastes, but also install itself as the power which made contracts for the parties, instead of enforcing contracts as the parties made them. The solution of this question will probably not be a difficult one.

Respectfully submitted.

GEORGE W. BRANDT,
Attorney for Plaintiff in Error.

17-593

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1151.

THE UNION TRUST COMPANY OF NEW YORK, APPELLANT,

vs.

EDWARD FITZGERALD

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 8, 1882.

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge, and the Hon. Samuel H. Treat, district judge of said district and associate judge of said circuit court, on Friday, the 27th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

J. A. JONES, *Clerk.*

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY, Willis Cauble and Henry Holbrook. } In chancery.

2 In the matter of the intervening petition of Edward Fitzgerald, filed in the above-entitled cause.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 6th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, The Union Trust Company of New York, a citizen of the State of New York, by Messrs. Judd and Whitehouse, its solicitors, filed in the office of the clerk of said court its bill of complaint against The Cairo and St. Louis Railroad Company, a corporation organized and existing under the laws of the State of Illinois, and located in said State of Illinois, defendant. And that afterwards, to wit, on the 4th day of June, in the of our Lord one thousand eight hundred and seventy-eight, came Edward Fitzgerald, by his solicitor, and filed in said clerk's office his intervening petition in said cause, and that such proceedings were had in the matter of said intervening petition, that, on the 27th day of October, in the year of our
3 Lord one thousand eight hundred and eighty-two, the following certificate of division of opinion was filed in said cause, to wit:

Certificate of division.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district, in equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of Edward Fitzgerald, filed in the above-entitled cause.

The matter of the intervening petition aforesaid, in the above-entitled

cause, was submitted to the Hon. Thomas Drummond, circuit judge, and Hon. Samuel H. Treat, district judge, etc.

On the 6th day of December, A. D. 1877, the complainant, The Union Trust Company of New York, trustee, etc., filed its bill of
4 complaint herein for the foreclosure of a mortgage or deed of trust executed by the defendant in the above-entitled cause, on the 2d day of October, A. D. 1871, and recorded before the first day of February, A. D. 1872, in the offices of the recorders of the various counties in the State of Illinois, into or through which the line of the railroad of said defendant was located and afterwards constructed, which mortgage or deed of trust covered all the property, real, personal, and mixed, which the said railroad company then owned, or should thereafter acquire, and which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad, and of all the other property and assets of the said Cairo & St. Louis Railroad Company covered by said mortgage or deed of trust; and thereupon the complainant in said bill moved the court for the appointment of a receiver in pursuance of the prayer of the said bill. The court allowed the motion, and appointed a receiver by order or decree of that date, in which order or decree, the court, of its own motion, inserted a clause, copied as follows, viz:

5 "The said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree."

The receiver thus appointed qualified and took possession of such railroad property and assets on the same day and afterwards, on the 4th day of June, A. D. 1878, the petitioner, Edward Fitzgerald, filed in this cause his intervening petition, praying for the allowance of his claim of three hundred and thirty-two dollars and twenty-eight cents ($332.28), set forth in said petition, for labor by him performed for said railroad company within six months prior to the appointment of the receiver aforesaid. An answer was filed by the respondent, The Union Trust Company of
6 New York aforesaid, neither admit'ing nor denying the allegations of the petition so far as the same referred to the claim aforesaid, and denying any diversion by the railroad company to or for the benefit of the mortgage bondholders from the current debt fund or gross income of said company within four years prior to the appointment of the receiver.

On the hearing before the special master, and afterwards before the court, it was proven by evidence heard in the matter of said intervening petition that the petitioner performed labor for the said Cairo & St. Louis Railroad Company in the operation of the railroad to the amount of three hundred and thirty-two dollars and twenty-eight cents ($332.28), within six months immediately preceding the appointment of such receiver, which amount remained wholly unpaid. On said hearing evidence was also heard showing that in the year 1876 a payment of three thousand dollars ($3,000) was made by the said Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, not to be applied on the bonded in-

7 debtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the said railroad company in respect to overdue interest. This was the only evidence offered or heard tending to show any diversion by the railroad company from the current debt fund or gross income of the said company to or for the benefit of the mortgage bondholders. A decree for payment and sale was rendered in the above-entitled cause May 16, 1881, and a sale had thereunder July 14, 1881, the mortgage property selling thereat for over four hundred thousand dollars ($400,000) less than was then due upon the mortgage indebtedness.

Evidence was also heard (under the objections of said Union Trust Company) showing that while said railroad was in the control of the receiver, under the appointment aforesaid, the net earnings thereof were more than sufficient to pay all the indebtedness of the said railroad
8 company for labor and supplies furnished to said company within said six months next preceding the appointing of said receiver; and also that said net earnings during the time of such receivership were applied from time to time, by order of this court for the preservation of the property, and, with the consent of the complainant, in purchasing additional grounds and rolling-stock, etc., and in making permanent repairs or improvements upon said railroad property, instead of discharging therewith the claims against said railroad company for labor, materials, and supplies.

It was also proven upon the hearing that the unpaid claims for labor, materials, and supplies furnished to such railroad company and used upon said road and appurtenances within the six months next preceding the appointment of said receiver, including the claim of the petitioner, amount to the sum of sixty-five thousand dollars ($65,000) and upwards.

For the allowance of these unpaid claims intervening petitions
9 were filed in this cause on or before July 1st, A. D. 1881, and are still pending in this court.

On the hearing of the matter of said intervening petition upon this state of facts, the opinion of the circuit judge prevailing, a decree was entered in favor of the petitioner's claim as paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint, in respect to the granting or rendition of which decree the opinions of the judges were opposed upon the following points, the affirmative of each of which was held by said circuit judge and the negative thereof was claimed by the complainant, The Union Trust Company of New York, as one of the respondents in the matter of said intervening petition, viz:

First. Whether the court, in the order of December 6th, A. D. 1877, appointing the receiver herein, or subsequently in the progress of the cause, had power to direct the payment out of the money in the registry of the court, or that might thereafter be paid into the registry of the court, arising from the sale of the property covered by the mortgage
10 or deed of trust, of claims for labor similar to those stated in the petition in this case, in preference to the claim arising upon the mortgage or deed of trust to the complainant in this cause, there being no evidence showing a previous diversion of money from the current earnings

or income of the said railroad company prior to the appointment of the receiver herein, except the proof introduced showing such diversion in the manner stated, to the extent of three thousand dollars ($3,000).

Second. Whether the court had the right to make the order directing the payment of the claim of the petitioner in this cause, under the circumstances stated and proved.

Consequently the judges hereby state the said questions and certify the same, and direct that this certificate hereof be entered of record.

THOMAS DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Indorsed:) Filed October 27th, 1882. J. A. Jones, clerk.

11 And on the day last aforesaid (being Friday) at the June term of court, the following proceedings were had in said court, in said cause, and entered of record, to wit:

Final decree.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY et al. } In chancery.

In the matter of the intervening petition of Edward Fitzgerald, filed in the above-entitled cause.

And now, on this 27th day of October, A. D. 1882, this cause coming on again in the matter of the said intervening petition of Edward Fitzgerald aforesaid, said petitioner being represented by Thomas C. Fletcher, his solicitor and counsel, and The Union Trust Company of New York, complainant in the above-entitled cause, and respondent in the matter of said intervening petition, being represented by Judd & Whitehouse, its solicitors and counsel; and the exceptions heretofore filed
12 herein, of both said petitioner, Fitzgerald, and said respondent, The Union Trust Company of New York, to the report of the special master in chancery filed herein, in respect to the matter of the intervening claim of said petitioner now coming on to be heard, and the court having heard the arguments of counsel for the respective parties in respect to such exceptions, and being now fully advised in the premises (the opinions of the judges being opposed in respect to sustaining the exceptions of said respondents and the opinion of the circuit judge prevailing), it is ordered that said exceptions of the said petitioner, and also the said exceptions of said respondent to said report of said special master, be, and the same are hereby, overruled; and the petitioner now excepts to the decision of the court in overruling his said exceptions, and the respondent, The Union Trust Company of New York, objects and excepts to the overruling of its said exceptions.

And now the said petitioner having moved the court for judg-
13 ment according to the said report of the special master aforesaid (and the opinions of the judges being opposed, as aforesaid, upon said motion, but the opinion of the circuit judge prevailing), it is further

ordered that said report of said special master be, and the same is hereby, in all things confirmed, whereto said respondent, by its counsel aforesaid, objects and excepts; and thereupon (the opinion of the judges being opposed, as aforesaid, upon certain points stated in a certificate of division filed herein, but the opinion of circuit judge prevailing), it is ordered, adjudged, and decreed that the petitioner is entitled to the payment of his claim so found due by the said special master, to wit, the sum of three hundred and thirty-two dollars and twenty-eight cents ($332.28) out of the money now in the registry of this court, or hereafter to come into such registry, arising from the sale of the railroad property and assets covered by the mortgage or deed of trust mentioned and referred
14 to in the bill of complaint in this cause, and that he is so entitled to such payment of his claim as being paramount to the indebtedness secured by the mortgage or deed of trust referred to in said bill of complaint; and it is further ordered, adjudged, and decreed that the clerk of this court pay to said petitioner the sum aforesaid out of any money now in the registry of this court, in this cause, arising from the sale of the railroad property and assets covered by the mortgage or deed of trust aforesaid, or, if sufficient money is not now in such registry, then that he pay the aforesaid amount of said claim to the petitioner out of any money arising from such sale that may hereafter come into the registry of the court, and that the respondent pay the costs herein expended; to all of which said respondent, The Union Trust Company of New York, by its counsel, objects and excepts.

Whereupon the said respondent, The Union Trust Company of New York aforesaid, by Judd & Whitehouse, its solicitors and counsel,
15 having now prayed an appeal to the Supreme Court from this final decree in the matter of said intervening petition of said Edward Fitzgerald, it is ordered and decreed that the said appeal be, and the same is hereby, granted and allowed, the appeal bond by consent of the parties to be in the penal sum of five hundred dollars ($500), executed by S. Corning Judd; which bond is now presented and approved by the court.

And thereupon, on the day last aforesaid, came The Union Trust Company of New York, by its solicitors and filed in said clerk's office the following appeal bond in said matter, to wit:

Appeal bond.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

16 In the matter of the intervening petition of Edward Fitzgerald, filed in the above-entitled cause.

Know all men by these presents that I, S. Corning Judd, of the city of

Chicago, State of Illinois, am held and firmly bound unto the above-named Edward Fitzgerald in the sum of five hundred dollars ($500), to be paid to the said Edward Fitzgerald, his executors or administrators, to which payment, well and truly to be made, I bind myself and my heirs, executors and administrators, firmly by these presents. Sealed with my seal and dated this 27th day of October, A. D. 1882.

Whereas the above-named The Union Trust Company of New York, trustee, has prosecuted an appeal to the Supreme Court of the United States to reverse the final decree rendered in favor of the said Edward Fitzgerald in the above-entitled suit, by the circuit court of the United States of the southern district of Illinois:

17 Now therefore the condition of this obligation is such that if the above-named The Union Trust Company of New York, trustee as aforesaid, shall prosecute its appeal with effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

S. CORNING JUDD. [SEAL.]

Approved in open court this 27th day of October, A. D. 1882.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed October 27th, 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 1st day of November, in the year last aforesaid, the following stipulation between the parties in said matter was filed in said clerk's office, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

18 In the circuit court of the United States for said district, in equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of Edward Filzgerald, filed in this cause.

It is hereby stipulated and agreed by and between the parties in the matter of said intervening petition that the bill of complaint, orders, decrees, testimony, and other matters stated and set forth in the record or transcript prepared for the Supreme Court of the United States in the matter of the intervening petition of E. E. Souther & Brother, and certified by the clerk of this court on the first day of November, A. D. 1882, may apply to the matter of the above-named intervening petition, except so far as said record or transcript applies solely to the matter of the said intervening petition of E. E. Souther & Brother, and the same may

19 be referred to and used by either of the parties in the matter of this

intervening petition on the appeal herein to said Supreme Court, and may be printed as a part of the record in the matter of the appeal in this cause if desired by either party.

Dated November 1st, 1882.

JUDD & WHITEHOUSE,
Sol'rs, & of Counsel for said Union Trust Co.
THOS. C. FLETCHER,
Sol'r, & of Counsel for Petitioner.

(Indorsed:) Filed November 1st, 1882. J. A. Jones, clerk.

And on the day last aforesaid came the petitioner, by his solicitor, and filed in said clerk's office his waiver of citation in said matter, which said waiver of citation is in the words and figures following, to wit:

Waiver of citation.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

20 In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of Edward Fitzgerald, filed in the above-entitled cause.

The petitioner in the above-entitled matter, by its solicitor and counsel, hereby waives the issue and service of the citation, and the undersigned, counsel for said petitioner, hereby agrees to appear instanter upon the filing of the transcript and the docketing of the appeal in the above-entitled case.

Dated Nov'r 1st, A. D. 1882.

THO. C. FLETCHER,
Sol. & Counsel for the Intervening Petitioner.

(Indorsed:) Filed November 1st, 1882. J. A. Jones, clerk.

21 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court for said district.

I, John A. Jones, clerk of the circuit court of the United States, within and for said southern district of Illinois, do hereby certify that the foregoing are true and correct copies of the certificate of division, filed in court October 27th, 1882; the final decree, rendered by said court October 27th, 1882; the appeal bond, filed October 27th, 1882; the stipulation, filed

November 1st, 1882, and the waiver of citation, filed November 1st, 1882; all in the matter of the intervening petition of Edward Fitzgerald, filed in a certain cause pending in said court, wherein The Union Trust Company of New York is complainant and The Cairo and St. Louis Railroad Company, Willis Canble, and Henry Holbrook are defendants, as fully as the same now appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed
22 the seal of said court, at my office, in the city of Springfield, in said district, this 2d day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 1151. The Union Trust Company of New York, appellant, vs. Edward Fitzgerald. S. Illinois, C. C. U. S. Filed 8th November, 1882.

1 ADDITION TO RECORD 1150, 1151.

United States Supreme Court, October term, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, Appellant, vs. JOHN WALKER, APPELLEE. } No. 1150.

THE UNION TRUST COMPANY OF NEW YORK, Appellant, vs. EDWARD FITZGERALD, APPELLEE. } No. 1151.

Appeals from the circuit court of the United States for the southern district of Illinois.

It is hereby stipulated and agreed by and between the parties that the amount found due to appellant, and ordered to be paid by the decree for payment and sale rendered by the court below on the 16th day of May, A. D. 1881, in the foreclosure case against the Cairo & St. Louis Railroad Company and others, wherein the above-named appellees respectively filed their intervening petitions, was the sum of four million three hun-
2 dred and one thousand one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53), which, with interest at six per cent. per annum, was ordered by said decree to be paid; and that said sum was not inserted in the decree as certified in the case of The Union Trust Company of New York, appellant, vs. E. E. Souther & Brother, appellees, No. 1152, on the docket of the present term of this court, by reason of the mistake of the clerk of the court below in not filling the blanks in a printed copy of the said decree for payment and sale used in making up the transcript for this court.

And it is further agreed that this stipulation may be considered and printed as part of the record in the two causes above entitled.

Dated Dec. 8, 1882.

S. CORNING JUDD, &
WILLIAM F. WHITEHOUSE,
Counsel for Appellant.

THO. C. FLETCHER,
Counsel for Appellee.

(Indorsed:) U. S. Supreme Court, 1882. Oct. term. Union Trust Co. of New York vs. John Walker, No. 1150. Same vs. Edward Fitzgerald, No. 1151. Stipulation to correct record. Filed 11th Dec. 1882.

(Stamp:) Office Supreme Court U. S. Filed Dec. 11, 1882. James H. McKenney, clerk.

6394——1.

OFFICE, SUPREME COURT U. S.
FILED
JAMES H. MCKENNEY, Clerk.

15631

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

GEORGE W. HILL,
Pltff. in Error,
v.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN AND WILLIAM H. BARNUM,
Defts. in Error.

Error to the Supreme Court of Illinois.

Argument for Defendants in Error.

WM. H. BARNUM,
PRO SE.
ADOLPH MOSES,
ATTORNEY FOR DDFTS. IN ERROR.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

GEORGE W. HILL,
Pltff. in Error,
v.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN AND WILLIAM H. BARNUM,
Defts. in Error.

Error to the Supreme Court of Illinois.

Addenda to Statement of Plaintiff in Error.

When the recognizance was taken plaintiff in error moved for the dissolution of the attachment. It was dissolved upon his own *express motion*, March 28, 1877.

The claim of defendants in error was a disputed debt. Plaintiff in error filed an affidavit that he had a good defense to the whole of it. The trial lasted more than four weeks; the case was before the jury nineteen days. The result was a verdict of $3,500 on a claim of $8,264; defendants in error, by leave of court, during the trial, waiving and striking out of their bill of particulars about $2,500.

On the return of the verdict, April 12, 1878, plaintiff in error entered a motion for a new trial, which defendants in error, after due notice given, called up for argument on April 20, 1878.

Counsel for plaintiff in error insisted upon three weeks' postponement, and induced the court to set his said motion for a new trial for argument on May 11, 1878, *counsel for defendants in error objecting to said postponement.*

Ten days after thus procuring this postponement, plaintiff in error, on May 1, 1878, filed his petition in bankruptcy. On May 7, without notice or leave of court, he filed in said cause the certificate of adjudication of bankruptcy.

On May 11, plaintiff in error, having given defendants in error one day's notice, suggested his bankruptcy, and moved for a stay of proceedings. Counsel for defendants in error insisted that the court should first take up the motion for a new trial, which plaintiff in error had himself caused to be set for argument and disposal on that day. But the court, upon objection to that course, took up the motion for stay of proceedings first, and after overruling the same, next considered and overruled the motion for new trial.

ARGUMENT.

I.

THE MOTION TO STAY PROCEEDINGS WAS PROPERLY REFUSED.

The opinion of the Supreme court of Illinois, whose decision is now sought to be reversed, is reported in 93 Ill., 77, *Hill* v. *Harding*. A copy of the opinion is embodied in the printed transcript here at pages 27 to 31.

The following extracts from opinions of various federal and state tribunals, demonstrate that the action of the courts of Illinois stands upon both reason and authority.

In re Albrecht, 17 National Bankruptcy Register, 287, it was held:

"Where a creditor had commenced a suit against the "bankrupt in a state court more than four months before "the commencement of proceedings in bankruptcy, and "had garnished credits in the hands of a third person, and "the garnishment had been released by giving a bond to "pay the judgment, *held*, that the plaintiff had a right to "prosecute the suit so far as to fix the liability of the "sureties upon the bond, notwithstanding the discharge.

"A discharge of the bankrupt does not impair the "remedy of a creditor against the sureties upon a bond "given to dissolve an attachment issued more than four "months before the commencement of proceedings in "bankruptcy." * * *

BROWN, J., delivering the opinion, said: "This case "turns upon the construction given to the several pro- "visions of the bankrupt law, with respect to the dissolu- "tion of attachments, and the effect of a discharge. Sec- "tion 5,044 enacts, that the assignment of the bankrupt, "'shall dissolve any attachment made within four months "next preceding the commencement of the bankruptcy "proceedings.' Section 5,106 provides that 'no creditor "whose debt is provable, shall be allowed to prosecute to "final judgment any suit at law or in equity, therefor, "against the bankrupt, until the question of the debtor's "discharge shall have been determined; and any such suit "or proceedings shall, upon the application of the bank- "rupt, be stayed to await the determination of the court "in bankruptcy on the question of the discharge, *provided "the suit may proceed to judgment for the purpose of "ascertaining the amount due*,' &c. Section 5,119 de- "clares that 'a discharge in bankruptcy, duly granted, "shall release the bankrupt from all debts, claims, liabili- "ties and demands, which were, or might have been, "proved against his estate in bankruptcy.'

"A distinction is taken, in the section first above quoted, "between attachments issued more, and those issued less "than four months before the commencement of proceed- "ings in bankruptcy. While nothing is said, in express "terms, with regard to the former, the clear inference is, "that the liens acquired by them were designed to be "preserved. Such is the uniform course of decision, and, "indeed, it was conceded that if the bond had not been "given, and the garnishment proceedings thereby discon- "tinued (Comp. Laws, Section 6,512), the plaintiff would "have been at liberty to prosecute his suit, at least so far "as to protect his lien upon the money in the hands of the

" garnishee, and this petition could not have been sustained. " (*Peck* v. *Jenness*, 7 How., 612; *Davenport* v. *Tilton*, 10 " Met., 320; *Bates* v. *Tappan*, 3 N. B. R., 647; 99 Mass., " 376; *Bosworth* v. *Pomeroy*, 112 Mass., 293; *Bowman* v. " *Harding*, 4 N. B. R., 20; 56 Me., 559; *Stoddard* v. *Locke*, " 9 N. B. R., 71; 43 Vt., 574; *Doggett* v. *Cook*, 37 Conn., " 341; *Doe* v. *Childress*, 11 N. B. R., 317; 21 Wall., 643.)

" It is insisted, however, that as soon as the bond was " filed, and the suit in garnishment discontinued, the ac- " tion became a purely personal one, and subject to be " barred by a discharge, as if no garnishment had ever " issued. The question does not seem to have been passed " upon in the federal courts. The state authorities are " in direct conflict." * * *

After pointing out certain inconsistency between the Massachusetts decisions rather to the disadvantage of *Carpenter* v. *Turrell*, 100 Mass., 450, relied on by plaintiff in error here, the opinion proceeds to dispose of another of said plaintiff's cases in this wise:

" The case of *Payne* v. *Able*, (4 N. B. R., 220, 7 Bush, " 344), though an apparent authority in favor of the petitioner, is really of no pertinence, *as the attachment was levied* (in July, 1868), *less than four months before the peti-* " *tion was filed*," (which was on October 22, 1868. See report of case.)

" The case of *Carpenter* v. *Turrell* is criticised by the " New York courts in *Holyoke* v. *Adams* (10 N. B. R., " 270), in which, under similar circumstances, it was held " that the discharge in bankruptcy would not prevent " judgment being recovered, and the sureties upon the " bond being bound therefor. Motion was made in this case " for a stay of proceedings, and the court held that the

"execution and delivery of the undertaking in attachment "was, in legal contemplation, a continuation of the attach- "ment proceedings. The propriety of this is apparent "from the obligation assumed by the sureties, which is to "pay any judgment that may be recovered in the action, "*the sureties thus agreeing to do exactly what the property* "*seized, would do when applied, viz: pay the judgment ob-* "*tained;* and also from the presumption that the property "levied upon would have remained *in statu quo* until the "judgment was recovered, if the undertaking had not "been given." * * * "The Supreme court of New "Hampshire, in *Zollar* v. *Jauvrin*, (49 N. H., 114), "indicated a very decided opinion in the same direction, "although the case went off upon another point. The "court observes: 'It would seem to be beyond doubt "that if it be the policy of the law to protect such securi- "ties, *its protection should also be extended to the case where,* "*for the benefit of the debtors, the lien of an attachment is* "*only dissolved by the substitution of another security.*' In "my opinion these cases enunciate the sounder principle. "It was the obvious intent of the legislature to preserve "the lien of attachment acquired more than four months "before the commencement of bankruptcy proceedings, "as well as to annul writs thereafter issued; and we are "bound to give effect to this intention, even if in so doing "we depart from the letter of other general provisions of "the statute in sections 5106 and 5119, relative to dis- "charges." * * * * * "*I deem it* "*inconsistent with the general purpose of the act to hold* "*that the lien of a creditor, lawfully acquired by his diligence,* "*shall be lost by the debtor giving a bond to satisfy the judg-* "*ment, an action entirely beyond the control of the creditor,* "*and one which was designed to secure, not to defeat, the*

"*ultimate payment of his debt.* The bankrupt law has "wisely interposed to protect the property of an insolvent "debtor from being swallowed up by attachments issued "upon the eve of bankruptcy, but has not interfered "with liens acquired in the ordinary course of business, "and before insolvency is threatened. But under the "construction given by the Massachusetts courts, the "preference of the attaching creditor is lost, if the debtor "is sufficiently responsible to obtain a bond, while it is "preserved, if his situation is so desperate as to make the "release of the property impossible. Subsequent cases "in the same court indicate the serious consequences likely "to follow the practical enforcement of this doctrine. In "*Hamilton* v. *Bryant* (14 N. B. R., 479; 114 Mass., 543), "the bond in attachment was not given until the adjudica- "tion in bankruptcy, and two years after the commence- "ment of suit; and yet the court held the plaintiff was "not entitled to a special judgment against the defendant "and sureties. (*Braley* v. *Boomer*, 12 N. B. R., 303; "116 Mass., 527; *Johnson* v. *Collins*, 12 N. B. R., 70; "117 Mass., 343.) From this, then, it results that any "attachment lien existing on the property of the bank- "rupt at the time of filing the petition, may be defeated "by any person interested adversely to such lien (as, for "instance, another creditor or the assignee) giving a bond "in the name of the defendant, with sureties, to pay the "judgment; in other words, securing the debt by a bond "which can never be made available itself, and which "destroys the security plaintiff already had. A more "complete subversion of the legislative intent can scarcely "be imagined. I think the language used in section 5044 "should be construed to qualify the general provisions of "the later sections with regard to discharges."

It will be observed that all the Massachusetts authorities cited in plaintiff's brief are reviewed in the foregoing case. And they are so effectually disposed of, in our opinion, as to require no further attention.

In re Albrecht, *supra*, 17 Bankruptcy Reg., 287, does not stand alone. The same conclusions were previously reached in precisely similar cases:

Holyoke v. *Adams*, 10 Bankruptcy Reg., 270. Same case on appeal, 13 Bankr. Reg., 413 (59 N. Y., 233).

Other cases cited in main opinion.

In *Byers* v. *The First National Bank*, 85 Ill., 423, the Supreme court of Illinois held that sections 5106 and 5118 of the United States revised statutes must be read together, and that notwithstanding the letter of the former section, *so long as its objects were not frustrated or impaired*, a judgment might be rendered against a bankrupt and others liable for or with him as joint contractors, sureties or otherwise, for the purpose of charging s others, and that all the objects of section 5106 could be accomplished by staying execution against the bankrupt "on a proper application by any one interested in the as-"sets of the bankrupt."

There was in that case an order of the United States district court expressly restraining the plaintiffs from prosecuting the action to judgment, but the Supreme court held that it did "not deprive the court in which the cause "was pending, of jurisdiction or power to hear and deter-"mine the cause and to render judgment, and if the court "proceeds to judgment, it is not error. The persons en-"joined may be guilty of contempt, but that does not "render the judgment erroneous."

Here we have an authoriative decision of the Supreme court of Illinois, diametrically opposed to *Penny* v. *Taylor*, 10 Bankruptcy Register, 200; *McKay* v. *Funk*, 37 Iowa, 661; *National Bank of Clinton* v. *Taylor*, 120 Mass., 124, and other cases cited by plaintiff holding that the instantaneous effect of a suggestion of bankruptcy is to paralyze the jurisdiction of the state court, and that any subsequent proceedings there are necessarily erroneous or absolutely void.

It will be found by our subsequent citations that plaintiff's cases are as little in harmony with the best considered decisions elsewhere as they are with that of the Suprme court of Illinois.

Hoyt v. *Freel*, 4 National Bankruptcy Register, 140, which is cited with approval in *Byers* v. *The First National Bank*, was an action in the Superior court of New York upon an appeal bond, conditioned that if "the "judgment (so) appealed from, or any part thereof should "be affirmed, or the appeal should be dismissed, the said "James Freel would pay the amount directed to be paid "by said judgment, or the part of such amount as to "which the said judgment should be affirmed, if it be "affirmed in part only, and all damages and costs which "should be awarded against said James Freel on said "appeal."

Pending the appeal, Freel filed his petition, and was duly adjudicated a bankrupt. The plaintiffs proved their debt in bankruptcy, and also sued upon the bond. The defendants, Freel and his sureties, moved in the state court for a stay of proceedings until the question of Freel's discharge should be determined. The court's decision is thus summed up: "The stay, as asked for, must be denied

"as far as the bankrupt is concerned, but all proceedings "on any judgment that may be obtained against him must "be stayed until the further order of the court."

With respect to the other two defendants who were sureties on the bond, the stay was *absolutely* denied.

The court quoted the section of the bankrupt act, providing that a "*discharge*" shall not release a surety, and concluded:

"The filing of a petition, which is merely the act of "setting on foot a proceeding to attain as its end a dis- "charge, cannot have a greater effect than the discharge "itself."

Particular attention is invited to the train of sound, analytical reasoning by which the court determined that the letter of one section must yield to the spirit and purposes of the other.

The objects and purposes of the act are, said the court:

"*First.* That the already acquired property of the "bankrupt shall not be subjected to the payment of his "debts, by means of a judgment recovered after the filing "of a petition, or of proceedings had on such judgment.

"*Second.* That the bankrupt shall not be needlessly "subjected to actions and suits.

"*Third.* And perpaps to enable the bankrupt to claim "protection as against such actions and suits, through his "discharge, if he obtains it.

"These are the only purposes and objects which the "clause for a stay in section 21 (now section 5,106) can by "any possibility be supposed designed to carry out.

"*It is not necessary to give effect to this clause for a stay, "to its full extent, to carry out these purposes.*

"Let us take them in them in the inverse order.

"A bankrupt can obtain the full protection of his dis-
"charge after as well as before judgment, on application
"to the court in which the action is pending. * * *

"The commencement and prosecution of an action
"against a bankrupt, together with his co-partners or co-
"joint contractors, and the rendering of a joint judgment
"therein is not needless but absolutely necessary. It is
"not therefore requisite to apply the clause for a stay to
"such cases, in order to carry out the second object.

"Section 14 (now section 5044) enacts that the assign-
"ments to be made thereunder, shall relate back to the com-
"mencement of the proceedings in bankruptcy; conse-
"quently no judgment rendered on a provable debt, nor any
"proceedings had thereon, can create a lien, or subject to the
"payment of the debt any already acquired property of
"the bankrupt. The stay, therefore, is unnecessary for
"this purpose."

From these concurrent decisions in Illinois and New York, it is apparent that state courts of those states at least consider the provisions of section 5106, in reference to a stay of proceedings not as exacting from them a blind and servile obedience, at all hazards, and every sacrifice of existing and acknowledged rights, but as merely addressed to their sound and intelligent discretion to be enforced with discrimination, and due regard to all rights and remedies, not in necessary conflict with the objects and purposes of the act taken as a whole.

The state courts undoubtedly have the power to stay proceedings in every such case, but they are not therefore bound to exercise it. Neither are the federal courts.

"Because the district court does possess such a juris-
"diction under the act, there is nothing in the act which
"requires that it should be, in all cases, absolutely exer-
"cised. On the contrary, where suits are pending in the
"state courts, and there is nothing in them which requires
"the equitable interference of the district court to pre-
"vent any mischief or wrong to other creditors under the
"baukruptcy, or any waste or misapplication of the
"assets, the parties may well be permitted to proceed in
"such suits and consummate them by proper judgments
"and decrees, especially where there is no suggestion of
"fraud or injustice on the part of the plaintiffs in those
"suits. The act itself contemplates that such suits may
"be prosecuted and further proceedings be had in the
"state courts, for the assignee is, by the third section,
"authorized to sue for and defend the property vested in
"him under the bankruptcy, subject to the orders and di-
"rections of the district court; and all suits at law and in
"equity then pending, in which such bankrupt is a party,
"may be prosecuted and defended by such assignee to a
"final conclusion."

This language of Justice STORY is quoted and endorsed by HOFFMAN, J., of the United States district court, in California, *In re Davis*, 4 Bankruptcy Register, 720, where it was expressly held that the 21st section (now section 5106), "was evidently intended merely to subject such suits to the "control of the bankruptcy court, and to enable that court "to stay them 'wherever required, to prevent mischief or "wrong to other creditors, or waste or misplacement of "assets.' But it was not intended to declare that the "adjudication in bankruptcy *proprio vigore* should divest "the ordinary tribunals of jurisdiction, and all subsequent "proceedings should be *coram non judice* and void, even

"when taken with the assent of the bankruptcy court, *and* "*when clearly necessary to protect and enforce the rights* "*of third parties.*"

* * * "That the bankruptcy court has jurisdiction "to suspend or control such proceedings *by acting on the* "*parties;* but that *in the absence* of such interference, the "jurisdiction of the state courts remains unimpaired, and "their decrees and judgments are valid and effectual."

This is no new doctrine of the federal courts. As long ago as 1848 the Supreme court of the United States maintained it in *Peck* v. *Jenness*, 7 How., 326, where Mr. Justice GRIER, delivering the opinion, said:

"The district court has exclusive jurisdiction, 'of all "suits and proceedings in bankruptcy.'

"But the suit pending before the court of common pleas "was not a suit or proceeding in bankruptcy; and although "the plea of bankruptcy was interposed by the defendants, "the court was as competent to entertain and judge of that "plea as of any other. It had full and complete jurisdiction "over the parties and the subject matter of the suit; and its "jurisdiction had attached more than a month before any "act of bankruptcy was committed. It was an independent "tribunal, not deriving its authority from the same sover- "eign, and, as regards the district court, a foreign forum, in "every way its equal. The district court had no super- "visory power over it. The acts of Congress point out "but one mode by which the judgments of state courts "can be revised or annulled, and that is by thiscourt, un- "der the 25th section of the judiciary act."

To the same effect is *Sampson, Assignee*, v. *Burton et al.*, 4 Bankruptcy Register, 12, where creditors were proceeding against the bankrupt by suit in the state court, and

the district court refused to enjoin them, and held also that it had no authority to withdraw the cases from the state court and proceed to try them itself; that congress had made no such provisions; that *the extent of the debts must be ascertained somewhere* before even the question of discharge could be passed upon by the district court, and that the state court was the only tribunal for ascertaining their extent.

The right of the state court to proceed was not held dependent at all upon any order of the federal court permitting it, as supposed in *Penny* v. *Taylor*. There was no such order. The word "order" is not used in section 5106. "By leave of the court of bankruptcy" is the language. And the true construction is, that the leave is granted so long as there is no order to the contrary. The Supreme court of Illinois held that the state court might proceed even despite such restaining order.

Surely a state court is not bound to stay proceedings in the very same case where the federal court, on application, would refuse the stay.

There can be no doubt that in the present case the district court would have refused the stay for the same reasons given in *Sampson* v. *Burton*, *supra*. Plaintiffs' counsel knew better than to make such an application.

Mr. Justice BLATCHFORD, *In re Rosenberg*, 3 Benedict, 17 (2 Bankruptcy Register, 239), quoting the clause in reference to a stay, said: "*This* provision is especially "addressed to *the bankrupt court*, and the stay provided "for *is to be, and is, in practice, granted by that court.*" * * "*If the amount of a debt is in dispute, the suit may proceed so* "*as to put the debt in a condition of provability*, and then it "must stop."

Mr. Justice BLATCHFORD, in another case, expressly said that he would not interpose by injunction to stay a suit in the state court where the indebtedness was disputed. *In re Richardson*, 2 Bankruptcy Reg., 203.

And in still another case where, as here, the bankrupt by his plea in the state court, "wholly denied the indebt-"edness," he held that the suit should proceed to judgment, and that application might then be made to his court for stay of execution.

In re Rundle et al., 2d Bankruptcy Reg., 113.

And the district court in Pennsylvania held: "In the "case * * of a creditor who has not proved his debt, there "is no reason for sending him into the court of bankruptcy "to apply for permission to proceed."

Dingee v. *Becker*, 9 Bank. Reg., 513.

The very section of the bankrupt law (Sec. 5106) which authorizes a stay, contains the proviso that "the "suit may proceed to judgment for the purpose of ascer-"taining the amount due."

In plaintiff's brief it is stated that the court below entered a judgment in the case for the purpose of charging the sureties in the recognizance. *This nowhere appears of record to be the fact*, and the whole of counsel's fault-finding with the court on that score is groundless, since it does not appear in fact that any "inquiry concerning the liability of the sureties," *was* considered in the court below, and there being reason enough, independent of that, for refusing the stay, to ascertain the amount of a disputed debt, if nothing more—upon which reason his Honor Judge BOOTH, did in fact predicate his action—the court

was bound to refuse the stay, and was not bound on counsel's own reasoning to consider the effect of its action on the sureties.

If, however, the court did take into consideration the fact that the sureties would thereby be charged, that certainly was no reason for reversing its action. To have done so would have been most inequitable as well as strictly illegal.

Many pages of appellant's briefs have been wholly devoted to the discussion of propositions which we are not concerned to deny. They would be entirely in place if this were an action against the sureties on the bond. It will be time enough for the courts to show their favoritism toward sureties when the sureties are sued and in court. But we never heard it contended before that a court should extend its partiality beyond its precincts and the boundaries of the record to persons who may never be before it.

When the sureties shall be sued, they are at liberty to "stand on the very terms of their statutory bond," and if any "act done by the obligee that may injure the surety" can then be found, we shall resignedly see the court "lay hold of it in favor of the surety." If there is any doubt, then, about the condition of their bond being broken, it may be "solved in their favor." They may never be called upon, as appellant may pay the judgment, there being nothing in the bankrupt law to forbid that.

It is not true, as counsel contends, that sureties generally are under no moral obligation whatever to pay the obligee. They may be under no moral obligation "*independent of their covenants*," (15 Wallace, 140), but a tremendous qualification lies in those words, especially when the bond and

its covenants are the instrumentality for taking away a specific lien, such as an attachment.

Now as to counsel's four cases "holding," as he says, "that when the liability of the surety is not for the debt "but for a judgment which may or may not be rendered, "he is discharged by the bankruptcy of the principal." Three of those cases were actions against sureties on appeal bonds to pay judgments and simply decide that *no judgments having been obtained*, the sureties were not liable on their bonds—a self-evident proposition. Whatever else was said in each case was mere *dictum*, and based at that on a mistaken view of the bankrupt law.

Nor do we agree with counsel that "the principle in- "volved in the case of an appeal bond, and in the case of a "bond given to dissolve an attachment, is precisely the "same." The difference would seem very obvious. No lien is vacated by an ordinary appeal bond. If the judgment appealed from is not a lien, none is vacated, and if it is, it remains a lien. But in the case of bonds and recognizances like the present one, the attachment lien on specific property by which the debt was absolutely secure, is gone entirely.

The true solution of this question is, that "*where the act* "*leaves in a creditor a right which only a judgment can* "*make available, there is an implied right to a judgment.*"

"A legal right without a remedy would be an anomaly "in the law," as the Supreme court of the United States said in *Peck* v. *Jenness*, 7 How., 612, where the question was whether, notwithstanding the plea of bankruptcy by defendant, a judgment could be rendered in order to enforce the lien of an attachment.

The court said:

"By the fourth section of the act, it is declared that 'the "certificate, or discharge, when duly granted, shall, in all "courts of justice, be deemed a full and complete discharge "of all debts, contracts, and other engagements of such "bankrupt which are provable under this act, and shall, or "may be pleaded as a full and complete bar to all suits "brought in any court of judicature whatever.' And it is "contended, as the lien of the attachment was defeasible, "and could only be rendered absolute and of practical "benefit to the plaintiff by the recovery of a judgment "for his demand, which is effectually barred by the plea, "that therefore the action and the lien must fall together.

"This conclusion would be undoubtedly correct, if we "construe this section of the act by itself, and without re-"gard to other provisions of the same act.

"But it is among the elementary principles, with regard "to the construction of statutes, that every section, pro-"vision and clause of a statute shall he expounded by a "reference to every other; and, if possible, every clause "and provision shall avail, and have the effect contem-"plated by the legislature. One portion of a statute "should not be construed to annul or destroy what has "been clearly granted by another. The most general and "absolute terms of one section may be qualified and lim-"ited by conditions and exceptions contained in another, "so that all may stand together."

After a review of the various sections of the act bearing on the case, the court's conclusion was that the general terms of the fourth section did not defeat the rights saved by other parts of the act, and that the plaintiffs were entitled to their judgment.

The form of it was, "That the plaintiffs recover against "the said Philip Peck and William Bellows $1,818.87 "damages and costs of this suit; which sums are *to be* "*levied only of the goods and chattels and estate of the de-* "*fendants attached* upon the plaintiffs' writ aforesaid * "* * and not otherwise,"— the usual form of judg- "ments, it is believed, in such cases.

How this differs, in substance or principle, from a general judgment with an order staying execution, we are unable to perceive; and such an order appellant, or his assignee, or any person interested in his assets, can have for the asking at any time. The judgment entered against him in no manner affects the estate in bankruptcy, and appellant's discharge will discharge the judgment as it would have done the debt.

Chief Justice SHAW, in the very lucid opinion delivered by him in *Davenport* v. *Tilton*, 10 Metc., 328, distinctly says that a judgment in attachment even, is "in form a "judgment *in personam*, but in substance and legal effect "a judgment *in rem*." His decision as to the implied but none the less absolute right of the plaintiff to such a judgment agrees entirely with that of the Supreme court of the United States in *Peck* v. *Jenness*, *supra*. He says that "if an attachment is a lien or security on property to be "made available only by a judgment and execution of "some kind," then there would be a proviso in legal effect, although unexpressed, as follows:

"Provided, that nothing in this act contained shall be "construed to prevent an attaching creditor from obtain- "ing such judgment and execution as may be necessary "to give legal effect to his attachment." 10 Metc., 329.

When the recognizance was given in this case, the implied right to a judgment was also given, since without it the recognizance could never be made available, and the courts, looking through and through *the law*, not at a mere single section in it, should be able to read between the lines a proviso as effectual to prevent judicial robbery as Chief Justice SHAW found in *Davenport* v. *Tilton*.

Examples of such wise and salutary construction are, happily, not wanting in Illinois.

The Supreme court, in *Castner* v. *Walrod*, 83 Ill., 179, said:

"The intention of the law-makers may be collected from "the cause or necessity of the act; and statutes are some- "times construed contrary to the literal meaning of the "words.

"It has been decided that a thing within the letter was "not within the statute, unless within the intention. The "letter is sometimes restrained, sometimes enlarged, and "sometimns the construction is contrary to the letter. (4 "Bac. title Statute, 1, Secs. 38, 45, 50.) Every statute "should be construed with reference to its object, and "the will of the law-makers is best promoted by such a "construction as secures that object and excludes every "other."

"A thing which is within the intention of the makers of "a statute is as much within the statute as if it were within "the letter, * * * and such a construction ought to be "put upon it as does not suffer it to be eluded."

The People v. *Utica Ins. Co.*, 15 Johns., 381.

See also

The People v. *The Canal Comm'rs*, 3 Scam., 156.

Decker v. *Hughes*, 68 Ill., 41.
Davis v. *Haydon*, 3 Scam., 36.
Mason v. *Finch*, 2 Scam., 224.
Bryans v. *Buckmaster*, Breese 410.
Burke v. *Monroe Co.*, 67 Ill., 614.
Bruce v. *Schuyler*, 4 Gilm., 271.

A few suggestions will be added chiefly by way of correction of certain inaccuracies which have heretofore occurred in plaintiff's brief, and will doubtless be repeated.

It seems to be supposed by plaintiff's counsel that the bankrupt law of 1867 differed from that of 1841, in not containing a provision for the prosecution, by the assignee, of all pending suits to which the bankrupt was a party. This is an error. Section 5,047 of the law of 1867, has precisely the same provisions. (Bump on Bankruptcy, 9th Ed., p. 535.) Hence the force of *Peck* v. *Jenness*, 7 How., 326, is unabated as an authority on the point for which it was cited, on pages 12 and 17 of our brief.

We think that case, and *Davenport* v. *Tilton*, 10 Metc., 328, decided by Chief Justice SHAW, dispose entirely of the present controversy.

By the letter of the then bankrupt law, there could have been no judgment obtained in those cases, even for the purpose of saving the attachment, because the very claim on which the judgment and attachment were to rest was discharged by the certificate, and barred by the plea of bankruptcy. But the Supreme Court of the United States held that "*where the act leaves in a creditor*

"*a right which only a judgment can make available, there* "*is an implied right to a judgment;*" and Chief Justice SHAW said that implied right was as strong as if expressed in the language cited, *ante* page 19.

Davenport v. *Tilton*, 10 Metc., 329.

There occurs in plaintiff's brief another clear misapprehension of the purport of the closing passages of the opinion, *In re* Albrecht, 17 Bankruptcy Register, 287.

The court in that case having clearly decided the present question, adversely to the view entertained by plaintiff here, simply intimated at the close, that for the purpose of letting the same question be raised in the state court, the assignee might be entitled, if he had prayed for it to a *temporary* stay, instead of a permanent one, such as he asked.

The deference thus shown by the federal to the state court, is manifest and significant. The jurisdiction and right of the latter to decide the question for itself are conceded. The confidence of the United States court, that the decision of the state court would be the same as its own, is equally apparent.

The question had not been raised in the state court. Hence the following statement in plaintiff's brief is misleading, viz:

" A temporary stay of proceedings until the question of " a discharge to appellant should be determined, was all " that was asked in the Circuit court. The opinion of " the court in the case *in re* Albrecht, was that this should " have been granted."

There could scarcely be a more utter misapprehension of a court's real meaning than that contained in the last

two sentences, unless it be found in the unwarrantable inferences which counsel draws, elsewhere in his brief, from the opinion of the New York court of appeals, in *Holyoke* v. *Adams*, 59 N. Y., 233. Of course, it was true that if the plea of bankruptcy was interposed, and judgment thereon was for defendant, the sureties in the bond to dissolve the attachment would be discharged. But why? Simply because their only obligation was to pay *a judgment*. No judgment, no obligation. But the opinion is explicit on the power of a state court to go on to judgment, and to disregard an offered *plea* of bankruptcy, let alone a mere suggestion on the eve of judgment.

Another argument of plaintiff's counsel is a perfectly unique *non sequitur*, as it seems to me. If it be true, as contended on the strength of numerous authorities, that the sureties in the recognizance, if they have to pay the judgment hereafter, will have recourse against plaintiff, notwithstanding his bankruptcy, and can compel him to reimburse them, then it is all important to clearly perceive the reason why this is true. *The reason is that such payment af the judgment will create a new debt, which had no existence, "certain, uncertain or contingent," at the date of bankruptcy, adjudication or discharge*—a debt, therefore, which the bankrupt law was never intended to discharge. This will appear from all of plaintiff's citations, and particularly from *McMullen* v. *Bank*, 2 Penn., State R., 345, to which, and *Cake* v. *Lewis*, 8 Penn. State R., 493, we invite especial attention.

The effect of the judgment is not, therefore, as the Supreme court of Massachusetts supposed, in *Page* v. *Cole*, to prevent the bankrupt's discharge from operating upon any debt which he owed at the time of bankruptcy—

and none others were intended to be discharged by the bankrupt law. Whatever debts plaintiff owed at the date of bankruptcy are discharged, including his debts to defendant. But the sureties' obligation was to pay *the judgment*—notwithstanding the debt culminating in it *was* discharged.

If, contrary to the view of plaintiff's counsel, the sureties on the recognizance could have proved up their claim, growing out of their liability on the recognizance, against plaintiff's estate in bankruptcy, then plaintiff would be discharged from future liability to them, and *hence* would be unaffected by the entry of judgment against him, and would have no right to complain of such judgment.

Without asserting how the law stood on this question under the bankrupt act of 1867, we shall content ourselves with citing sections 5068, 5069 and 5070 of that act with Bump's notes thereto, from which it will appear that the old law of 1841, under which many of plaintiff's cases were decided, has been materially changed by new additions and modifications in the act of 1867, leaving the question discussed by counsel much more uncertain, perhaps, than he supposes.

However, in our view, it is wholly immaterial to the present inquiry whether plaintiff will or will not hereafter become liable over to his sureties. That is *their* concern. If he shall become liable to them, it will be upon a new debt, which the bankrupt law was never designed to discharge. If he shall not be liable to them, it will be because his bankruptcy has discharged him. In either case, the entry of judgment for defendants in nowise injuriously affects any rights which the bankrupt law conferred upon him.

Upon this subject we will cite, also, Section 189 of Brandt on Suretyship, written by the author of plaintiff's brief.

Before closing, we wish to remark, with reference to *Carpenter* v. *Turrell*, 100 Mass., 450, so much relied on by counsel, that a stipulation controlled that case, and there is no such stipulation in this. "It was agreed," says the statement (p. 450), "that the defendants' plea of the pend-"ency of proceedings in bankruptcy might be taken as a "plea of discharge in bankruptcy, and should have the "same operation and effect as the defendants' discharge "would have, if they had obtained and pleaded the same."

That case further differed from this, as the next sentence shows, in that the only ground of plaintiffs' request for judgment was to enable them to recover on the bond, while here the court acted on no such request, but on the fact that *the indebtedness and the amount of it were disputed*—a subject, by the way, wholly untouched in plaintiffs' brief.

Another noticeable thing is, that by the Massachusetts statute under which *Carpenter* v. *Turrill* arose, a plaintiff could commence suit by attachment *without giving* bond. Hence, perhaps, and justly, his advantages gained so easily were not so highly esteemed or charily preserved by the courts.

In conclusion, we refer the court to *Knapp* v. *Anderson*, 7 Hun., N. Y., 295, and *Hall* v. *Fowler*, 6 Hill, 630, citations which we take from Brandt on Suretyship.

Respectfully submitted.

WM. H. BARNUM,
Pro Se.

ADOLPH MOSES,
Attorney for Defendants in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

GEORGE W. HILL,
Plaintiff in Error,

v.

GEORGE F. HARDING,
WILLIAM H. BARNUM,
LAWRENCE J. J. NISSEN,
Defendants in Error.

Error to the Supreme Court of Illinois.

Brief and Argument in Support of Motion, and Exhibits to Dismiss Writ of Error.

ADOLPH MOSES,
Attorney for Defendants in Error.

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Defendants in Error.

Error to the Supreme Court of Illinois.

MOTION SUBMITTED BY DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR UNDER RULE 6, AS AMENDED.

Brief and Argument in Support of Motion by Adolph Moses, for Defendants in Error.

MAY IT PLEASE THE COURT:

This writ of error was sued out of this court on January 6th, 1880, and made a supersedeas by compliance with the act of Congress. The judgment was rendered in the Circuit Court of Cook County for $3,500, and was removed by appeal to the Appellate Court of the First District of Illinois, where it was affirmed. It was further removed to the Supreme Court of Illinois by appeal, and was there again affirmed. (See *Hill* v. *Harding*, 93 Ill. page 77.)

It will appear by an inspection of the Record, that, after verdict, the plaintiff in error availed himself of the benefit of the bankrupt law of the United States by filing his voluntary petition in the Northern District of Illinois on April 22, 1878; whereupon he was duly adjudicated a bankrupt. An assignee was duly elected, and an assignment passed to his assignee on June 17, 1878. The proceedings eventuated in the bankrupt's discharge, insued to him on Sept. 15, 1878, and he has thus been discharged by law from the obligation of the judgment, attempted to be reversed in this proceeding. The Court, upon inspection of the record, will see that the debt was provable in bankruptcy, and does not come within the exceptions of Section 5117, R. S., U. S.

We herewith submit certified copies of the bankruptcy proceedings prior to and posterior to the adjudication in bankruptcy, which latter appears in the record on page ; and it will thus appear, that, prior to the suing out of this writ of error, the plaintiff in error, had no further interest in the subject matter of this litigation.

This point is well established in this Court, and rests upon reason.

Herndon v. *Howard*, 9 Wall. 664.
Knox v. *Exchange Bank*, 12 Wall. 379.

It may be suggested by plaintiff in error, that the assignee's name may be substituted, and that the writ proceed to hearing. But as the plaintiff in error was not adjudicated a bankrupt, pending the present proceeding, no amendment or substitution can take place, as he was *civiliter mortuus* when judgment was rendered in the first court, and, prior to the present writ, *he had actually been discharged from the obligation of the debt.*

The Supreme Court of Illinois has likewise ruled that the assignee in bankruptcy is the proper party to sue out

the writ of error, if adjudication is had, after judgment, and before discharge. *Jenkins* v. *Greenebaum*, 95 Ill., 11.

In *Knox* v. *Exchange Bank*, *supra*, the dismissal for this cause was by the Court, *sua sponte*, upon examination of the record. In that case it appeared that, although the record showed a discharge in bankruptcy, procured while the cause was pending in the Court of Appeals, an order was made in the Court of Appeals, that an execution might issue after notice to the bankrupt. Hence said case is not to be construed that the assignee in bankruptcy could have prosecuted *said* writ of error, but that if said lower court would thereafter, upon notice to the bankrupt, order an execution to be issued against him, a new writ of error might be sued out by the assignee in bankruptcy, because there would be an obligation of the bankrupt in existence, which the assignee would be competent to challenge by a writ of error.

But in a case, where the bankrupt has been *finally discharged*, neither he nor the assignee have any interest left in the subject matter of litigation.

We therefore respectfully submit that the motion to dismiss this writ of error must prevail.

Respectfully submitted,

ADOLPH MOSES,

Attorney for Deft's in Error.

SAME ENTITLED CASE AS FOREGOING.

MOTION.

Now come said defendants in error, by Adolph Moses, their attorney, and respectfully move said court to dismiss this writ of error and to vacate the supersedeas granted herein, because:

1. At the time of the suing out of said writ, said

plaintiff in error had been discharged from the obligation of the debt, in controversy in this cause, and in support of this motion said defendants in error refer to the record of this cause, wherein the adjudication of the bankruptcy of plaintiff in error was by him suggested, just prior to the entry of the verdict in said cause.

2. The proceedings in bankruptcy are hereby submitted, showing the discharge of plaintiff in error from the debt in controversy, which was scheduled by him.

3. The affidavit of William H. Barnum, one of the defendants in error herein, verifying the fact that said plaintiff in error is the George W. Hill adjudicated bankrupt in said proceedings.

Chicago, November 6, 1880.

ADOLPH MOSES,

Attorney for Deft's in Error.

SAME ENTITLED CASE AS FOREGOING.

AFFIDAVIT IN SUPPORT OF MOTION.

STATE OF ILLINOIS, }
Cook County, } ss.

William H. Barnum, of said county, on oath says that he is one of said defendants in error; that the plaintiff in error herein is the same person who filed his petition for adjudication of bankruptcy in the Northern District of Illinois, and was finally discharged in said bankruptcy proceedings from all his debts, including the debt in controversy in this cause.

WILLIAM H. BARNUM.

Subscribed and sworn to this 4th day of November, 1880

EXHIBITS.

1. Voluntary petition of George W. Hill to the District Court of the Northern District of Illinois, for adjudication of bankruptcy. Dated and filed April 22, 1878.

2. Schedule A. 2.—Bankruptcy, whereon said Hill places Harding, Nissen and Barnum, defendants in error, as creditors for legal services, amounting to $8,600; alleging that said firm began an attachment suit against him, and that T. B. Rice and H. M. Singer became sureties for him in said suit; that a verdict was rendered in said cause on April 12, 1878, for $3,500; that he denies the legality of the claim.

3. Adjudication of bankruptcy by H. N. Hibbard, Register, on May 1, 1878. Filed May 7, 1878.

4. Assignment by said Register of all the estate, real and personal of said bankrupt to Enoch G. Hooke, assignee, under Sec. 5045, R. S. U. S., dated June 17, 1878, and filed July 1, 1878.

5. Discharge in bankruptcy.

DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois.

Whereas George W. Hill, of Chicago, in the County of Cook, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States, title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf.

It is therefore ordered by the Court that said *George W. Hill* be forever disharged from all debts and claims which by said title are made provable against his estate, and which existed on the 22nd day of April, A. D. 1878, on which day the petition for adjudication was filed by said George W. Hill, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of said court, at Chicago, in said District, this 15th day of September, A. D. 1879.

H. W. BLODGETT, Judge.

[SEAL.] W. H. BRADLEY, Clerk,

All of said exhibits are duly certified to by W. H. Bradley, Clerk of, and under the seal of said court on Nov. 4, 1880, to be true, correct and complete copies of the original petition in bankruptcy, Schedule A. 2, 2, the adjudication of bankruptcy, the deed of assignment, and the discharge in bankruptcy.

SAME ENTITLED CASE AS FOREGOING.

NOTICE.

To GEORGE W. BRANDT, Attorney of Plaintiff in Error:

TAKE NOTICE: That on Monday, November, 29, 1880, at the opening of said Court, or as soon thereafter as counsel can be heard, the defendants in error will move said Court to dismiss said writ of error, and to vacate the supersedeas granted herein, for the reasons set forth in motion, and grounds in support thereof, a copy of which is herewith submitted to you, at which time you may appear if you so see fit.

ADOLPH MOSES,

NOVEMBER 6th, 1880. *Att'y for Deft's in Error.*

I hereby accept service of above motion, and copies of brief, argument and exhibits, this 6th day of November, A. D., 1880.

GEORGE W. BRANDT, Att'y for Plt'f in Error.

No. 631

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

GEORGE W. HILL,
Plaintiff in Error,
v.
GEORGE F. HARDING,
LAWRENCE J. J. NISSEN,
WILLIAM H. BARNUM,
Defendants in Error.

Error to the Supreme Court of Illinois.

Brief and Argument of Defendants in Error, in Opposition to the Cross-Motion of Plaintiff in Error.

ADOLPH MOSES,
Attorney for Defendants in Error.

CHICAGO, ILL.:
S. I. Bradbury & Sons, Legal Printers, 78 Fifth Ave.
1880.

IN THE

Supreme Court of the United States.

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GEORGE W. HILL,
Plaintiff in Error,
v.
GEORGE F. HARDING,
LAWRENCE J. J. NISSEN,
WILLIAM H. BARNUM,
Defendants in Error.

Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR, IN OPPOSITION TO THE CROSS-MOTION OF PLAINTIFF IN ERROR, FOR LEAVE TO SUBSTITUTE THE NAME OF THE ASSIGNEE IN BANKRUPTCY IN THE PROSECUTION OF THE WRIT OF ERROR HEREIN.

I.

The defendants in error, having given notice to the plaintiff in error, that they will move this Court to dismiss said writ of error, because said plaintiff in error had been discharged in bankruptcy prior to the suing out of this writ, attempt to avert the force of this motion, by his cross-motion, for leave to the assignee in bankruptcy to substitute his name on the record, and to further prosecute this writ of error, which has the force of a supersedeas by virtue of a supersedeas bond, filed by the bankrupt. Counsel for plaintiff in error seem to base their right to do this on the authority of *Gates* v. *Goodloe*, 101 U. S. R. p.

612. We do not so construe the decision in that cause. No reference is made to the case of *Knox* v. *Exchange Bank*, 12 Wall, 379, where this Court decided differently. In *Gates* v. *Goodloe, supra*, there was one legal plaintiff in error besides those without legal capacity, to prosecute a writ of error, and the case can not be considered as overruling, *Knox* v. *The Exchange Bank, supra.*

We do not see upon reason why this cross-motion should be granted. The bankrupt is discharged from the obligation of the judgment, although it was rendered subsequent to the filing of the petition in bankruptcy.

The debt existed before the judgment was entered, and the amount being disputed, it required a judgment to settle the amount of the disputed claim. Sec. 5106, R. S. U. S.

The action of the assignee in this case is ostensibly not for the benefit of the bankrupt estate, which cannot be benefited by a reversal of this judgment, but may be involved in legal expense in the prosecution of this writ. No order of court appears, authorizing the prosecution of the writ of error by the assignee in bankruptcy, and the motion seems to be the purely personal act of the assignee, not in his representative capacity.

No motion is made to continue the supersedeas by the giving of a new supersedeas bond, for it is evident, that without a new bond the supersedeas must be vacated, although the substitution might be allowed. But we respectfully maintain, that the acts of the plaintiff in error, who had no right to sue out this writ, were of no legal force, and that the writ of error should be quashed. If thereafter the bankrupt court should order that, in the interest of the bankrupt estate, a writ of error should be prosecuted by the assignee, he then would have the legal right so to do. But it is submitted, that no Court would

authorize an assignee to prosecute a writ of error, unless the act could be beneficial to the estate. A prosecution of this writ of error will delay the winding up of the estate, and will keep the assignee in office for several years, until the case can here be heard, while it is contrary to every provision of the bankrupt law to delay the winding up of bankrupt estates. If a substitution were permissible, it must be a real and not a formal substitution. No new supersedeas could be granted upon substitution, because the time for granting such has expired.

II.

But even if a substitution was permissible in this case (which we deny), the Court, of its own motion, and particularly upon our suggestion, which is hereby pressed to the attention of the Court, will first look into the record and discover whether any question is raised in this cause, which would necessarily invoke the jurisdiction of this Court. If not, then a substitution would be a vain thing, and the Court would refuse to do a vain act.

We respectfully maintain that the record does not disclose that a federal question is necessarily involved in this cause, and for the purpose of examining this point we print the bill of exceptions contained in the record, viz.:

In the Circuit Court of Cook County: State of Illinois, County of Cook, ss.—Geo. F. Harding, Lawrence J. J. Nissen, and William H. Barnum, *v.* George W. Hill; attachment.—Be it remembered that on the 28th day of March, A. D. 1877, it being then of the March Term of said Circuit Court, the following order was made and entered of record in said cause, that is to say: This day came the said George W. Hill as principal, and Horace M. Singer and Thomas B. Rice as sureties, and entered

into a recognizance herein in open court, whereby they and each of them for themselves, their heirs, executors and administrators, acknowledge themselves to owe and to be indebted unto the said George F. Harding, Lawrence J. J. Nissen and William H. Barnum in the penal sum of sixteen thousand five hundred and seventy-eight dollars, to be levied of their respective goods and chattels, lands and tenements and real estate. The condition of which recognizance was such, that if the said George W. Hill should pay to the said George F. Harding, Lawrence J. J. Nissen and William H. Barnum the amount of the judgment and costs which may be rendered against him in this suit on a final trial thereof within ninety days after such judgment shall be rendered, then such recognizance shall be void, otherwise to remain in full force and effect.

It is therefore ordered that the attachment herein be and it is dissolved, and that the property taken by virtue thereof be restored to said defendant.

And be it also remembered that on the 26th day of May, 1877, it being then of the May Term of said Circuit Court, the following order was made by said Circuit Court by Wm. K. McAllister, one of the Judges thereof, and entered of record in said cause, that is to say:

On motion of said plaintiffs by their attorney, it is ordered by the court that the plea of said defendant filed herein, traversing the affidavit for the attachment writ, issued in said cause, be and the same is hereby stricken from the files of said cause.

And be it also remembered that on the day when the trial of the above entitled cause was commenced before the Hon. Henry Booth, one of the Judges of said court, to wit: on the 17th day of March, 1878, and before the trial of said cause was commenced, the said defendant made a

motion in said court before said Judge to reinstate the plea filed by him in said cause on April 18, 1877, traversing the affidavit for the writ of attachment issued in such cause, which was commenced by attachment, and for leave to contest the grounds on which said writ of attachment was issued before trying said cause on the merits, which affidavit was filed by said plaintiffs in said cause on the 16th day of March, A. D. 1877, and which plea so traversing said affidavit was stricken from the files by said court on the 26th day of May, A. D. 1877; but the said court, on the day and year aforesaid, to wit, the 17th day of March, 1878, and before the commencement of said trial, overruled said motion so made by said defendant, to which action of said court in so overruling said motion the said defendant at the time and in open court duly excepted; that on the hearing of said motion so made as aforesaid, no evidence save the records and files of said court in said cause was submitted by either of said parties, and said plea so traversing said affidavit for said writ of attachment was stricken from the files at the time hereinafter stated, on the ground that said attachment was previously to the filing of said plea, and on said defendant's motion dissolved by the entry of the recognizance of record in said cause, given by said defendant as principal, and Horace M. Singer and Thomas B. Rice as sureties, and said court denied said motion solely on and from the facts appearing on the face of the record and files in said cause.

And be it also remembered that the account filed with the declaration in said cause and for the recovery of the items whereof said suit was brought, as amended, was and is as follows, and not otherwise or different, to wit:

And the plaintiffs on the trial of said cause before said judge and jury, offered and introduced evidence tend-

ing to prove all of the items of said account, and the defendant on said trial offered and introduced evidence under his plea of the general issue, filed April 18, 1878, in denial of said evidence of said plaintiffs, and the said items of said account, are the only matters which were or are involved in said cause, and on which the verdict hereinafter mentioned by said Court was founded.

The jury impanelled in said cause on the 12th day of April, A. D. 1878, and of the March term of said Circuit Court of that year, retired and after deliberation brought in this verdict in the following words and figures:

"We, the jury, find the issue for the plaintiffs, and "assess the damages at thirty-five hundred dollars "($3,500.00.)

"CHARLES E. HULL, Foreman."

And thereupon and on the same day and year last aforesaid, said defendant entered his motion in said cause for a new trial thereof, and for cause why such motion should be granted afterwards on May 11, 1878, filed in said cause in writing, the following point, showing why said motion for a new trial should be granted, to wit:

CIRCUIT COURT OF COOK COUNTY,

State of Illinois, Cook County, ss.—George F. Harding, Lawrence J. J. Nissen and William H. Barnum *v.* George W. Hill. Action of Assumpsit.

In support of the motion for a new trial heretofore made in this cause, the defendant files the following reason:

The Court erred in denying the motion of the defendant to restore or re-instate his plea, traversing the facts stated in the affidavit for the attachment.

Afterwards, on April 20, 1878, plaintiffs by their counsel upon notice duly given to defendant's counsel called up for argument and disposal said motion of defendant for a

new trial, but said defendant's counsel insisted upon and obtained from the Court a delay of three weeks until May 11, 1878, for the Court's action upon said motion for a new trial, plaintiffs by their counsel objecting to said postponement.

And afterwards and before any judgment was rendered on said verdict in said cause, and before any other or further proceedings were had or taken in said cause, and on the seventh (7th) day of May, A. D. 1878, it being then of the April Term of said Court for that year, the defendant filed in said cause with the Clerk of this Court, a certificate in words and figures following:

In the District Court of the United States, for the Northern District of Illinois.

In the matter of George W. Hill, by whom a petition for adjudication of bankruptcy was filed on the 22nd day of April, A. D. 1878. In bankruptcy.

At Chicago, in said district, on the first day of May, A. D. 1878, before Homer N. Hibbard, Esq., Register in Bankruptcy.

Northern Districtof Illinois, ss. I, Homer N. Hibbard, one of the Registers in Bankruptcy of said Court, upon good proof before me taken, do find that the said George W. Hill has become a bankrupt within the true intent and meaning of the Revised Statutes of the United States, Title lxi, Bankruptcy, and amendments thereof; and I do hereby declare and adjudge him a bankrupt.

Witness my hand at Chicago, in said district on the first day day of May, A. D. 1878.

H. N. Hibbard, Register in Bankruptcy.

In the District Court of the United States, for the Northern District of Illinois.

In the matter of George W. Hill, bankrupt. In bankruptcy.

Northern District Illinois, ss. I, Homer N. Hibbard, a Register in Bankruptcy, in and for the said Northern District of Illinois, do hereby certify that the above and foregoing hereunto attached is a true copy of the adjudication of bankruptcy on debtor's petition in the above entitled matter as the same remain in my office.

In witness whereof I have at the city of Chicago, in said district, hereunto set my hand this first day of May, A. D. 1878.

H. N. HIBBARD, Register in Bankruptcy.

And, afterwards, to wit: on the eleventh (11th) day of May, A. D. 1878, and before any other proceedings were had or taken in said cause in said Circuit Court, and before said motion of said defendant for a new trial had been argued or disposed of, the said defendant having given to said plaintiffs one day's notice in writing in this behalf, suggested to said Circuit Court and on the record thereof, before the said Judge thereof, that said George W. Hill, defendant, had been, and on the 1st day of May, A. D. 1878, was adjudicated a bankrupt on his own petition as aforesaid by the District Court of the United States, for the Northern District of Illinois, sitting as a Bankrupt Court, and made a motion in said Circuit Court, before said Judge, and in said cause, to stay further proceedings in said cause in said Circuit Court, to await the determination of said Court of Bankruptcy on the question of the discharge of said George W. Hill in bankruptcy, and said defendant at the same time, and on the hearing of his said motion for such stay of proceedings, presented to said Circuit Court, without objections thereto, the aforesaid certificate of H. N. Hibbard. And it not being denied or questioned by anyone, that said George W. Hill had been adjudicated a bankrupt as aforesaid, counsel for plaintiffs and for defendant, argued said motion for stay

of proceedings on the basis that said fact of the bankruptcy of said George W. Hill existed as stated in said certificate, and the Court decided said motion on the basis that said fact of bankruptcy did exist.

Whereupon plaintiffs, by their counsel, insisted upon the taking up of defendant's said motion for a new trial first in order, but the Court determining otherwise, after hearing arguments of counsel in said motions for said stay of proceedings, overruled the same, to which action of said Circuit Court in so overruling said motion for said stay of proceedings, the said defendant, at the time the same was taken, in open court duly excepted. And thereupon afterwards, and on the same day said motion of said defendants for a new trial in said cause, came on to be heard before said Circuit Court, the same Judge presiding, and said Circuit Court, after hearing arguments of counsel on said motion for a new trial, overruled the same, and rendered a judgment on said verdict of said jury, to which action of said Circuit Court in so overruling said motion for a new trial, and in rendering judgment on said verdict in favor of said plaintiffs and against said defendant, said defendant at the time the same was taken in open court, duly excepted.

And now, forasmuch as the matters and things aforesaid do not appear of record in said cause, in said court, the said defendant hereby tenders to the said Judge, the Hon. Henry Booth, who tried said cause, this bill of exceptions in said cause and prays that the said Judge may sign and seal the same, so as to make the matters and things as aforesaid a part of the record of said cause in said Circuit Court, which is accordingly done on this 25th day of June, A. D. 1878.

HENRY BOOTH, Judge, [SEAL.]

It will thus appear to the Court that on March 17, 1878, a trial to recover for attorney's fees was commenced, which resulted in a verdict of $3,500 on April 12, 1878. No federal question is thus far apparent. A motion for a new trial is interposed on the same day, April 12, 1878. This motion is called up for disposition by the then plaintiff, and the then defendant obtained from the Court a delay of three weeks until May 11, 1878, the then plaintiff objecting thereto. On May 7, 1878, *without leave of Court*, the defendant filed in said cause a certificate of the adjudication in bankruptcy of said defendant. On May 11, 1878, the said defendant after having given notice in writing to defendant (what notice is not stated), suggested to the Court and on the record thereof, that the defendant had been adjudicated a bankrupt on the first day of May, A. D. 1878, and made a motion to stay further proceedings in said cause to await the determination of said Court of bankruptcy on the bankrupt's discharge. Said defendant then presented without objection thereto said certificate of adjudication, and it was not disputed that said certificate did not state true facts, and the Court decided said motion on the basis "that the fact of bankruptcy did exist."

The record then stood as follows: 1. A verdict; 2. A motion for a new trial on April 12, 1878, made more emphatic by the defendant filing a written point in support of the motion on May 11, 1878; 3. The motion for a stay of proceedings was made, without withdrawing the motion for a new trial, made by the defendant himself, and still pending, and first in the order of time, and for the disposition of which motion a delay of three weeks had been asked for and obtained by said defendant.

It is not therefore surprising that the plaintiff insisted upon the disposition of the motion for a new trial, as first

in order; "but the court determining otherwise, first heard the motion for said stay of proceedings, and overruled the same after argument, to which action the defendant excepted." The court then overruled the motion for a new trial, and entered judgment on the verdict. *No further motion for a stay of proceedings was made by the bankrupt after judgment*, which would have been perfectly proper, if the motion had first been made in good faith to prevent the bankrupt from harrassment. Section 5,106 R. S. U. S. contemplates that, "where the amount due the creditor is in dispute, the suit by leave of the Bankruptcy Court may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed." The bill of exceptions fails to state affirmatively that no leave of the Bankruptcy Court was *not* had to proceed to judgment.

The Court will perceive that the bill of exceptions further fails to state that said section of the bankrupt law was brought to the notice of the Court, and that said Court necessarily gave any construction to the federal law, or that the decision was against it.

The Record is absolutely silent as to these facts, and the above recital conclusively proves that the decision of the Court, overruling the motion for a stay, might have been upon other grounds than one involving the construction of the bankrupt law. The Court was warranted to overrule said motion:

1. Because a delay of three weeks had been asked by defendant to dispose of his motion for a new trial, evidently with the design of filing a petition in bankruptcy, which occurred on April 22, 1878, as is stated in the Registers' certificate by way of recital.

In *Holden* v. *Sherwood*, 84 Ill., 92, the Supreme Court of Illinois frowned upon such a proceeding, ruling:

"He could not be permitted to lie by and permit the plaintiff to incur the expense of a trial, and when it terminated in a verdict against him, then, for the first time, to ask for a stay of proceedings."

2. The Register's certificate was filed without leave of Court, and no leave had ever been asked thereafter to refile it; and although the bill of exceptions states that *the fact* of bankruptcy existed, and that the Court decided the motion on the basis that the fact of bankruptcy existed, it is not stated that the adjudication existed, except as stated in the certificate.

3. The Court might well have decided that the proper time to move for a stay of proceedings was *after* judgment, as provided by law and might have therefore ruled that the motion [illegible]ay before judgment was premature. Courts are not bound to keep their causes on the Judge's docket on verdict. What shall the Court do when the discharge is brought in by the bankrupt? No pleadings can then be made up to plead the discharge *puis darrein continuance;* while after judgment, either a suit upon the judgment might test the validity of the discharge or a motion for a perpetual stay of execution might be made.

4. The motion papers might have been incorrect and one day's notice of the suggestion might not have been sufficient under the rules of said court, or some other technical reason might have brought about the decision of the Court.

5. The Court might have ruled that two motions cannot be made by a party at the same time, and the defendant, failing to withdraw his motion for a new trial first made, might have waived the benefit of his motion although the Court chose first to consider the motion for a stay. Although a motion for a stay is permissible under the fede-

ral law, yet such a motion comes within the proper procedure of Court business, and no litigant has the absolute right to enter two motions at the same time, particularly when he is asking the Court to stay a motion for a new trial, made by himself. The plaintiff had made no motion for a judgment on the verdict but the moving party was the defendant, when he asked the Court to stay proceedings on his own motion. Had he first withdrawn his motion for a new trial then he might, by way of cross-motion, have moved for a stay of the action of the Court on the verdict, upon the motion of the plaintiff for a judgment, if at that moment (and not after judgment) the motion was proper.

III.

It is true that the Supreme Court of Illinois, in the consideration of the case, disposed of the question of the stay of proceedings adversely to the plaintiff in error. *Hill* v. *Harding*, 93 Ill. 83.

But it also affirmed the judgment on other grounds discussed in the opinion. In the conclusion the Court say: "There are other grounds upon which this case might well have been affirmed, but we deem it best to dispose of it upon its merits and have accordingly done so." It clearly appears that the case could be affirmed on other grounds, for Justice Scott joins in the affirmance, although he did not concur in the construction given to the section of the bankrupt law, cited in the opinion.

The rule of the Supreme Court of the United States is, to decide the point of a federal question without looking at the opinion of the Court whose judgment is to be reviewed.

The Court sometimes looks into the opinion, for confirmation of its position and not to establish it. *Steines* v. *Franklin Co.*, 14 Wall. 15.

It appears that the question of the stay of proceedings was not *necessarily* a matter to be decided by the Supreme Court of Illinois, and as the judgment might have been affirmed upon other grounds, the mere *will* of the Supreme Court to discuss a question *sua sponte* can give no color to the jurisdiction of this Court, unless it otherwise appear either from the pleadings, evidence, or bill of exceptions that the actual decision was necessarily made, and that no decision could have been made, without deciding the federal question.

Murdock v. *City of Memphis*, 20 Wall., 590.
Rector v. *Ashley*, 6 Wall.,142.
Cockroft v. *Vose*, 14 Wall., 5.
Steines v. *Franklin Co.*, *supra.*
Moore v. *Mississippi*, 21 Wall., 636.

Thus also a federal question may be involved, although the Court below did not necessarily adjudicate it. *McManus* v. *O'Sullivan*, 91 U. S. R., 578.

If the entire record is scanned, no federal question necessarily arises in this case ; the opinion of the Supreme Court of Illinois cannot raise it, for that same opinion also holds that it was *unnecessary* to decide this point, *as the judgment might have been affirmed on other grounds.* If this record contains a certificate of the Chief Justice of the Supreme Court, of Illinois, showing that a federal question existed, this alone cannot give jurisdiction.

Parmelee v. *Lawrence*, 11 Wall, 36.

If the Court will look at the writ of error in this cause, no particular cause is alleged therein but the entire section 709 of the R. S. U. S., is therein copied.

No special assignment appears anywhere, which part of the statute is involved in this writ of error.

As none *necessarily* appears in the record, we respectfully

insist that no substitution ought to be allowed, as no federal question is necessarily presented in this record.

We pray for a dismissal of this writ of error for the reasons assigned in our first motion and for the reasons set forth in opposition to the cross-motion for leave to substitute the assignee's name on the record.

IV.

Should the substitution be allowed by the Court, then we submit that the fee bond required by rule *Ten* will cease to have any validity; that a new bond would have to be filed by the assignee.

If the motion to dismiss be denied, then we submit that the supersedeas should be vacated, because the assignee has not filed a new supersedeas bond, and as the time has expired in which a supersedeas may be obtained as a matter of right, it would require special permission as provided by Section 1007 R. S. U. S.

If a substitution were permissible under Sections 954, 948 or 1005, then we submit that such substitution should be upon terms as prescribed by Section 954.

Respectfully submitted,

ADOLPH MOSES,

Attorney for Deft's in Error.